Supreme Court, U.S.
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No. 03 270 AUG 19 2003

IN THE

SUPREME COURT OF THE UNITED STATES

ALABAMA-COUSHATTA TRIBE
OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents two issues:

A. Dicta as Binding. In a 1994 decision, the Fifth Circuit Court of Appeals found that statutes restoring a different tribe (the Ysleta Tribe) to federal status, rather than the Indian Gaming Regulatory Act, governed the Ysleta Tribe's gaming activity and that the federal courts had no jurisdiction to consider the Ysleta Tribe's claims under those restoration statutes. Regardless, operating under the discredited doctrine of hypothetical jurisdiction, the Fifth Circuit remarked that the Ysleta restoration legislation caused Texas gaming law "to operate as surrogate federal law" on tribal land. Given the disapproval by this Court in 1998 of hypothetical jurisdiction, can the Fifth Circuit now rely on this dicta to deny the Alabama-Coushatta Tribe's requested declaration of its gaming rights?

B. Cause for Remand. This Court decided what constitutes "prohibited" gaming on Indian lands in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ("*Cabazon*"). The history of the legislation restoring the Alabama-Coushatta Tribe to federal recognition (and also restoring the Ysleta Tribe with materially identical language) contains specific reference to *Cabazon* as controlling Alabama-Coushatta's gaming. Is remand appropriate when dicta in the *Ysleta* decision, now being relied upon to deny Alabama-Coushatta the right to gaming, was wrong?

ALL PARTIES TO THE PROCEEDINGS

The Alabama-Coushatta Tribe of Texas.

The State of Texas.

DISCLOSURE STATEMENT PER RULE 29.6

There is no parent corporation or public company related to the parties in this case.

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PETITION FOR A WRIT OF CERTIORARI

The Alabama-Coushatta Tribe (the "Tribe" or "Alabama-Coushatta") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

No official reports of this case have been published. The District Court decision (App. 9a-28a) and the Fifth Circuit opinion underlying this Petition (App. 3a-6a) are included in the Appendix. The Fifth Circuit considers its unpublished opinions to be binding precedent.

JURISDICTION

The judgment the Tribe seeks to have reviewed was entered in the Fifth Circuit Court of Appeals on April 16, 2003. (App. 3a-6a). The Order denying the Tribe's timely Motion for Rehearing en banc was entered May 22, 2003. (App. 1a-2a). The jurisdiction of this Court is invoked under United States Constitution article III, §2, clauses 2 and 28 and 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are 25 U.S.C. §§731 through 737, collectively referred to as the Alabama-Coushatta Tribes Restoration Act ("Restoration Act"). The entire text of the Restoration Act is included in the Appendix. (App. 46a-52a).

STATEMENT

This case concerns whether the State of Texas (the "State") may permit some gaming within the state, thus regulating rather than prohibiting it, but preclude the Tribe from conducting gaming operations on its own lands based on the Restoration Act which only purports to prohibit gaming on Reservation lands by subjecting such activities "to the same civil and criminal penalties" as provided by Texas state law. Although the grant of injunctive relief requires jurisdiction, the United States Court of Appeals for the Fifth Circuit, based on certain language in an earlier opinion that it lacked jurisdiction, nevertheless affirmed the Memorandum Opinion and Order (App. 9a-28a) of the District Court that the Tribe shut down its gaming operations, which the Tribe had been operating only on its Indian lands, thus depriving the Tribe of its source of revenue. (App. 3a-6a).

Petitioner the Alabama-Coushatta Tribe of Texas is a federally recognized Native American Tribe which was conducting a gaming operation on its own Reservation lands. During the fall of 2001, the Attorney General for the State of Texas, John Cornyn, and state officials under his control, made statements to the press that he would move to shut down any gaming operation on Alabama-Coushatta Indian lands. On November 21, 2001, the Tribe filed in the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. §1362 and 28 U.S.C. §§ 2201, 2202, an action to seek a declaration of the Tribe's rights, privileges, and opportunities as a matter of federal law (App. 29a-45a). The Tribe sought a declaration that the gaming activities were lawful so long as they were not prohibited by Texas criminal law. *Id.* The Complaint sought to enjoin the State from interfering with the Tribe's governance over gaming activities on Alabama-Coushatta trust lands where

such games were otherwise permitted within the State of Texas or not expressly prohibited. On January 7, 2002, the State filed its answer with a counterclaim alleging jurisdiction under 25 U.S.C. §731 and 28 U.S.C. §1331. The State counterclaimed that the Tribe should be enjoined from any gaming whatsoever occuring on its Indian lands.

During four days of hearings on the State's Motion for Preliminary Injunction, District Court Judge John Hannah, Jr. elevated the matter to trial on the merits. At the close of evidence, and after two rounds of post-hearing briefing, Judge Hannah on June 25, 2002, issued a Memorandum Opinion and Order granting the State's Motion for Preliminary Injunction, and ordered that within thirty days the Tribe cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in, gaming and gambling activities on the Tribe's reservation which violate state law. (App. 9a-28a). On July 17, 2002, the District Court issued orders denying the Tribe's motions for reconsideration and for stay pending appeal, and entered Final Judgment. (App. 7a-8a). The District Court concluded that the Tribe's gaming activities are illegal pursuant to the Restoration Act. (App. 21a and 25a). The District Court held that Texas law is surrogate federal law, preventing the Tribe from governing its own gaming activities (App. 25a), without regard to the fact that others in the State, namely the Texas State Lottery, can operate the exact same games at issue, pursuant to Texas law. *See Tex. Gov't Code Ann.* §466.101 et seq. (Vernon 2003).

On October 24, 2002, the Tribe was forced to cease all gambling activities on its Reservation. The Tribe appealed from the June 25, 2002 Memorandum Opinion and Order and from the July 17, 2002 Final Judgment.

On appeal to the Fifth Circuit, the District Court Order was affirmed; the appellate panel concluded it could not grant relief without deviating from its decision in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta*"), thus affirming the injunction based on a case finding a lack of jurisdiction. The panel was concerned with this result: "However sympathetic we may be to the Tribe's argument, we may not reconsider *Ysleta*, even if we believed that the case was wrongly decided." (App. 5a-6a). The Tribe is thus left with no avenue for relief other than this Petition.

REASONS FOR GRANTING THE PETITION

A. Summary of Argument

In the early 1990s, the Ysleta del Sur Pueblo (the "Ysleta Tribe") sought negotiations for a tribal-state gaming compact with the State under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701 *et seq.* When the State refused, the Ysleta Tribe sued. The United States District Court for the Western District of Texas held that the State was required to negotiate, and neither the Johnson Act nor the legislation restoring the Ysleta Tribe to federal recognition prohibited the types of games the Ysleta Tribe was proposing to operate. *Ysleta del Sur Pueblo v. State of Texas*, 852 F.Supp. 587 (W.D. Tex. 1993); (App. 77a-100a).

The Fifth Circuit reversed this decision finding that the Ysleta Tribe's gaming rights were governed by the Ysleta del Sur Pueblo's Restoration Act and not governed by IGRA, and further reasoned that the District Court could not have jurisdiction because, unlike IGRA, the Restoration Act did not include provisions abrogating the State's Eleventh Amendment immunity. *Ysleta*, 36 F.3d 1325 (5th Cir. 1994); (App. 53a-76a). Despite

ruling that the District Court lacked jurisdiction, the Fifth Circuit also opined that statutes restoring the Ysleta Tribe to federal recognition: (1) embodied any gaming compact the Ysleta Tribe was entitled to, (2) were not enacted with an intent to follow this Court's analysis in *Cabazon* regarding what is, and is not, prohibited gaming on Indian reservations, and (3) caused Texas gaming law to operate as surrogate federal law on the Ysleta Tribe's reservation. *Id.*

In the proceedings underlying the litigation at issue here, the Alabama-Coushatta Tribes sued for a declaration that the Tribe is entitled to conduct such gaming as would be allowed pursuant to this Court's *Cabazon* analysis under the statutes restoring it to federal recognition. These statutes are materially identical to those involving the Ysleta Tribe. They were codified separately, but were a part of the same legislation. The Fifth Circuit relied upon its dicta in *Ysleta* to preclude any further consideration of Alabama-Coushatta's arguments, despite the introduction of additional evidence in the District Court establishing that the Fifth Circuit interpretation of the Restoration Act in *Ysleta* was wrong.

Alabama-Coushatta was not a party to the *Ysleta* case. Its arguments were not considered in that case. Its issue was not presented - the Ysleta Tribe sued for an enforcement of its rights under IGRA whila Alabama-Coushatta seeks only confirmation that the *Cabazon* analysis applies to its conduct of gaming. Regardless, dicta from *Ysleta* has caused the Fifth Circuit to affirm an enjoining of Alabama-Coushatta's gaming operation. (App. 5a-6a). This case thus presents an extension by the courts below of the doctrine of hypothetical jurisdiction, which this Court has discredited, to Alabama-Coushatta's great harm.

The situation this application of dicta causes is inequitable and does not otherwise lead to the same result as application of the *Cabazon* analysis. The State permits

gaming. The State itself operates a lottery. It permits other gaming, including gambling at horse and dog tracks. Another tribe which exists within the exterior boundaries of the State, the Texas Kickapoo, operates a casino on its lands.

There is value to a remand of this case for a merits consideration of Alabama-Coushatta's underlying arguments. The dicta relied upon below is wrong. The Fifth Circuit has interpreted the relevant statutes in a manner inconsistent with the legislative history. Senator Morris Udall, commenting on the final version of the legislation restoring both the Ysleta Tribe and Alabama-Coushatta to federal recognition, stated:

> [T]he Senate amendments to these sections are in line with the rationale of that recent Supreme Court decision in the case of *Cabazon Band of Mission Indians v. California.* This amendment in effect would codify for these tribes the holding of a rational [sic] adopted in the Court's opinion in the case.

133 Cong. Rec. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall).

Ysleta incorrectly interprets the relevant statutory language by failing to correctly examine the legislative history or apply commonplace rules of statutory construction. Remand is thus appropriate for Alabama-Coushatta to be able to further brief and argue these points and for the courts below to further consider them without the influence of improper dicta. Under no circumstances should Alabama-Coushatta be bound to the result in *Ysleta* where the court in that case was hypothecating on rights of a separate tribe despite deciding that it did not have jurisdiction to hear the case.

B. A Determination of Alabama-Coushatta's Rights to Conduct Gaming Should Not Be Controlled by Dicta from a Case in Which the Fifth Circuit Was Opining Only Under Hypothetical Jurisdiction.

Under Supreme Court Rule 10(a), review is appropriate where a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(c) also establishes that review is appropriate where a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Those circumstances are present here. Specifically, the courts below ignored the admonishment of this Court that appellate courts are not to base decisions on dicta where the prior decision engages in hypothetical jurisdiction and opines on the meaning of a statute not properly before the court. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 89 (1998). The underlying dicta also misapplied traditional canons of statutory interpretation to a statute intended to embrace, rather than burden, the federal government's historic and judicially sanctioned trust responsibility to tribes.

In 1998, this Court rejected the notion of "hypothetical jurisdiction," whereby appellate courts sidestep jurisdictional issues to address the merits of a case:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without

> **jurisdiction the court cannot proceed at all** in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (emphasis added) (*quoting Ex Parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). *See also In re the Dep't of Energy Stripper Well Litigation*, 206 F.3d 1345, 1351 (10th Cir. 2000) (characterizing anything beyond jurisdictional dismissal as dicta). *Steel* and its progeny affirm that federal courts must first address whether they have jurisdiction. Once it is resolved that there is no jurisdiction, the court's authority to address the merits ends.

The holdings in the courts below in this matter rely, in their entirety, on the 1994 *Ysleta* decision of the United States Court of Appeals. The Fifth Circuit in *Ysleta* found that it lacked jurisdiction to hear the case. Yet, it went forward and opined on the merits. This dicta is now used to deprive Alabama-Coushatta of the opportunity to conduct gaming otherwise allowed by law.

The *Ysleta* court ruled that the Ysleta Restoration Act, 25 U.S.C. §1300g *et seq.*, rather than IGRA, governs the Ysleta Tribe's gaming activities, and therefore the district court, which had ruled entirely in favor of the Ysleta Tribe, did not have jurisdiction to hear the case. The appeals court in *Ysleta* held that since the Ysleta Restoration Act did not contain a congressional waiver of, and the State did not waive, Texas' Eleventh Amendment immunity from suit, the court was without jurisdiction to hear the matter and the case was remanded for dismissal. 36 F.3d at 1335-36.

Unfortunately, the *Ysleta* decision went further and included several passages as to what the panel thought the scope of gaming on the Ysleta Reservation would be if, hypothetically, the lower court had jurisdiction:

> Congress did not enact the Restoration Act with an eye towards *Cabazon Band.* Congress was merely acceding to the [Ysleta] Tribe's request that the tribal resolution be codified.

Id. at 1333-34.

> [U]pon reviewing these materials, we are left with the unmistakable conclusion that Congress – and the [Ysleta] Tribe – intended for Texas gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.

Id.

> [T]he [Ysleta] Tribe has already made its "compact" with the State of Texas and the Restoration Act embodies that compact.

Id. at 1335.

The *Ysleta* panel lacked jurisdiction to opine on what the language of the Restoration Act meant. The panel's analysis is pure dicta. This Court recognized in *Steel* the practice of appellate courts in addressing the merits of a claim prior to addressing the jurisdictional issues and adminished against such an approach:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise

> suggested, and without respect to the relation of the parties to it." The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Steel, 523 U.S. at 94-95 (citations omitted).

The Fifth Circuit cannot raise dicta to the level of precedent through the use of hypothetical jurisdiction, which is precisely what it did when opining on the meaning of the gaming passages in the Restoration Act. This Court in *Steel* states:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and especially constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). **For a court to pronounce upon the meaning** or the constitutionality **of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.**

Fundamental to American jurisprudence is the limiting of precedent to actual and necessary holdings of a court decision and recognizing that dicta or *obiter dictum*

is not binding. *Cuquenan v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 379 (1994) ("it is to the holdings of our cases, rather than their dicta, that we must attend"). In applying these standards to the holding of *Ysleta,* the holding must be limited to its jurisdictional dismissal. The remainder of the case is dicta grounded only on the court's hypothetical jurisdiction. Only two precedential points may be gleaned from *Ysleta:* (1) the Restoration Act and not IGRA applies to the gaming operations of the Ysleta Tribe; and (2) the Restoration Act alone did not waive Texas' Eleventh Amendment immunity from suit. Everything else in *Ysleta* is non-binding dicta. Alabama-Coushatta's case on the gaming provisions of the Restoration Act was not properly before the Fifth Circuit in *Ysleta.* Accordingly, the District Court's and Fifth Circuit's reliance on this discussion as the basis for their rulings below was improper and should be overturned by this Court.

The Ysleta Tribe's claims in 1993 were made pursuant to IGRA. *Ysleta del Sur Pueblo v. State of Texas,* 852 F.Supp. 587, 589 (W.D. Tex. 1993). It is without dispute that the Ysleta Tribe's claims were not made pursuant to the Restoration Act. On appeal, the *Ysleta* panel found that the district court lacked jurisdiction to hear the Ysleta Tribe's claims under IGRA. 36 F.3d at 1327. However, the *Ysleta* court went on to illustrate the infirmities of the claim pursuant to the Restoration Act. *Is.* at 1328-37. The discussion, by its very nature, did not address the controversy before the court. Accordingly, the Fifth Circuit's *Ysleta* language, upon which the courts below in this matter relied, is not controlling. The District Court and the Fifth Circuit panel hearing this Alabama-Coushatta case were free to render (and should have rendered) their decisions regarding the Tribe's claims without regard to the dicta in *Ysleta.*

The courts below, by binding themselves to the *Ysleta* decision, have perpetuated the sort of injustice that underscores this Court's admonishment against appellate courts engaging in hypothetical jurisdiction. The Fifth Circuit panel in this litigation recognized the injustice: "However sympathetic we may be to the Tribe's argument, we may not reconsider *Ysleta* even if we believed that the case was wrongly decided." (App. 5a-6a). This Court should remedy this injustice and require that the adjudication of these important tribal rights be based on the controversy before the court and not on the dicta of a case to which the Tribe was not a party.

C. The Fifth Circuit's Dicta in *Ysleta* Was Wrong and Remand of this Case Will Allow Alabama-Coushatta to Present, and Will Require the Court Below to Consider Without Being Influenced by Improper Dicta, All Evidence and Arguments on the Restoration Act.

Remand of this case will be fruitful. It will allow full appellate consideration of Alabama-Coushatta's arguments and evidence regarding the proper interpretation of the legislation restoring it to federal recognition. It will allow the courts below to consider the merits and rule on them in a case where they have actual jurisdiction without the improper influence of *Ysleta* dicta. It will allow a correction of the inequities caused by blind reliance on *Ysleta*.

The voluminous dicta set forth in *Ysleta* cannot withstand scrutiny. At the crux of understanding the *Ysleta* court's error are four events in the spring and summer of 1987. First, the Restoration Act (H.R. 318) was introduced into the House of Representatives with the following language prohibiting all forms of gaming:

> Sec. 207. (a) Gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the Tribe's reservation and on tribal lands. (b) Whoever violates the provisions of subsection (a) of this section shall be fined not more than $10,000 or imprisoned not more than two years, or both. (c) Nothing in this section shall be construed as a grant of civil regulatory jurisdiction to the State of Texas.

133 Cong. Rec. H111 (adopted by the Senate on September 25, 1986 as H.R. 1344, 132 Cong. Rec. S13636).

Second, on February 25, 1987, this Court issued its landmark decision confirming the inherent sovereign right of an Indian tribe to self-govern gaming activities on its Indian lands which are not criminally prohibited by state law, stating:

> [T]he Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory laws" if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as "civil/regulatory" and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

Third, on July 23, 1987, the Senate struck the language to section 207 as introduced and replaced it with the following language, which abandons the outright ban of the previous version and instead only limits gaming to that which is not "prohibited" by State law. Much of this language is lifted directly from the *Cabazon* opinion:

SEC. 207. GAMING ACTIVITIES.

(a) IN GENERAL. All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

H.R. 318, 100th Cong. First Session (1987); 133 Cong. Rec. S10568-03.

Fourth, on August 3, 1987, the House provided unanimous consent to concur with the Senate Amendment after Interior and Insular Affairs Committee Chairman Morris Udall, whose Committee had jurisdiction over the Restoration Act, stated to the full House:

> The Senate amendment makes changes to sections 107 and 207 of the [Restoration Act]. These sections deal with the regulation of gaming on the respective reservations of the two tribes. It is my understanding that **the Senate amendments to these sections are in line with the rationale of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes the holding and rational [sic] adopted in the Court's opinion in the case.**

133 Cong. Rec. H6972-05 (daily ed. Aug. 3, 1987) (statement of Rep. Udall) (emphasis added).

Not present in the record in prior cases involving the Ysleta Tribe, the trial in this matter included uncontroverted testimony of the three key Congressional staffers familiar with the Congressional deliberations of tribal governmental gaming in general, and deliberation of the Restoration Act, specifically, and intimately familiar with the rules, procedures, and policies of Congress at the time the Restoration Act was enacted. Transcript of Hearing, April 2, 2002, Docket 20, Testimony of Prof. Alex Skibine at pages 109-68, Testimony of Virginia Boylan at pages 169-85, and Testimony of Frank Ducheneaux at pages 286-302. Their testimony, and a review of the written legislative history, demonstrates that the Senate amendments were specifically crafted to protect the Tribe, and that the Senate amendments establish a clear rejection of the proposed concessions advocated by certain Texas officials and written into the legislation prior to amendment by the Senate.

Ysleta correctly sets forth this Court's determination in *Cabazon* that state law is criminal "if it generally *prohibits* certain conduct but a state law is civil, and presumptively inapplicable if it *regulates* the conduct at issue." *Ysleta,* 36 F.3d at 1330. But that is only a partial summary of the analysis. This Court completed the analysis by holding that enforcement of a regulatory scheme by criminal penalties does not convert a civil/regulatory scheme into a criminal/prohibitory scheme. *Cabazon,* 480 U.S. at 211-12. Indeed, the Restoration Act's provision in section 207(b) retaining the Tribe's "civil or criminal regulatory" jurisdiction reinforces the conclusion that section 207 (25 U.S.C. §737), as amended by the Senate, was specifically crafted to

embrace the *Cabazon* decision. A review of federal statutes does not reveal the term "civil or criminal regulatory jurisdiction" in any legislation prior to the issuance of the *Cabazon* decision.

Ysleta asserts: "[I]n considering the Restoration Act, Congress clearly was concerned with enacting the compromise between the Tribe, the State and various members of the Texas congressional delegation." 36 F.3d at 1333. That statement is mostly true in that language imposing a total ban on gaming was discussed regarding all versions of the legislation **prior** to the Senate amendments to the legislation. That statement is **entirely not true** regarding the language in the Senate amendments. Indeed, rejection of the prior language evidences a fundamental shift in the conerns of Congress. Such a fundamental shift was appropriate in the wake of the *Cabazon* decision. The "compromise" was embodied in the language introduced in the House; the "compromise" was rejected by the Senate's amendments. No legislative history can be presented by the State or cited by the Fifth Circuit which remotely suggests that the "compromise" had any force after the Senate's rejection of the House language.

Ysleta asserts that the Restoration Act's reference to enforcement by civil penalty is at odds with *Cabazon*. The panel missed the point. *Cabazon* stands for the proposition that a civil/regulatory scheme may be enforced by criminal, as well as civil, penalties:

> [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280.

Cabazon, 480 U.S. at 211. It follows that a criminal/prohibitory scheme may be enforced by civil, as well as

criminal, penalties. Indeed, lesser penalties for classes of offenders or non-repeat offenders are common in criminal/prohibitory enforcement schemes.

Ysleta dismisses Congresman Udall's statement as "just one representative that was recited at the twelfth hour of the bill's consideration." 36 F.3d at 1334. At all times during the consideration of the Restoration Act legislation (H.R. 1344 and H.R. 318), Congressman Morris K. Udall was Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives. Transcript of Hearing, April 2, 2002, Docket 20, Testimony of Frank Ducheneaux ("Ducheneaux Testimony") at pages 286-302. In the House, this committee had general jurisdiction over most Indian legislation and affairs and had exclusive jurisdiction over H.R. 1344, H.R. 318, and all of the Indian gaming legislation. *Id.*

From the 96th Congress through the 101st Congress, there was no subcommittee for Indian affairs on the Interior Committee. *Id.* This jurisdiction was held within the full Committee. *Id.* All Indian legislation referred to the Committee was under Chairman Udall's direct management as was the Indian affairs staff. *Id.* As Chairman of the Committee, Mr. Udall had a duty under the rules of the House to bring H.R. 1344 and H.R. 318, as reported, to the House for action. *Id.* As Chairman, he managed the successful floor consideration of H.R. 1344 in the 99th Congress and H.R. 318 in the 100th Congress. *Id.* The Senate passed the bill, with the amendment language at issue here, on July 23, 1987. 133 Cong. Rec. S10568-03. On August 3, 1987, the House concurred in the Senate amendments. 133 Cong. Rec. H6972-05. It was during the act of the House concurrence that Mr. Udall made the quoted statement. *Id.*

On July 23, 1987, the Senate returned to the House H.R. 318 with Senate amendments thereto and it was received in the House on July 24, 1987. 133 Cong. Rec. S10568-03.

Under the rules of the House, the House at that point could have:

(1) Referred the bill back to the Committee on Interior and Insular Affairs;

(2) Concurred in the Senate amendments;

(3) Concurred in the Senate amendments with a further amendment and sent it back to the Senate; or

(4) Disagreed with the Senate amendments and requested a conference

Ducheneaux Testimony.

Under the rules of the House and Senate, only the Chairman of the committee of reference or his designee had authority, and would have been recognized, to offer a motion to ask unanimous consent to do any of those four things. *Id.* A committee chairman would elect option (1), (3), or (4) if the bill as amended by the Senate were unacceptable. A committee chairman would only elect option (2) if he found the Senate amendments to the bill to be acceptable.

The chairman's power in this regard is a substantial one. Only he had a right to, and only he would have been recognized to, call the bill up. *Id.* When Rep. Udall made his unanimous consent request, the Ranking Minority (Republican) member of the Interior Committee or his designee undoubtedly reserved the right to object so that Chairman Udall could give an explanatory statement. *Id.* Thus, the statement that he made that day was not just "his personal understanding" of the meaning of the Senate's amendments to the gaming provisions.

Mr. Udall was Chairman of the Committee with jurisdiction over the bill, and he was the floor manager of the bill. His consent was necessary for the House concurrence in the Senate amendments. *Id.* He would not have given it if he did not fully understand the meaning of the amendments and if he did not intend them to have the meaning he assigned to them. The analysis in *Ysleta* suggests that 434 members gave unanimous consent, believing Congressman Udall was speaking gibberish about the Senate amendments' effect. Far from the twelfth-hour comments, the express reference to the *Cabazon* decision was made at the singular opportunity to address the House floor when seeking unanimous concurrence to the Senate amendments.

Basic canons of statutory construction militate in favor of construing the Restoration Act and *Cabazon* harmoniously. Section 207 of the Restoration Act was changed from an outright unequivocal ban on all forms of gaming to a version that merely precludes gaming that is "prohibited" in Texas. Even in the absence of Rep. Udall's statement that the change was intended to incorporate the "criminal/prohibitory" distinction from *Cabazon,* canons of statutory construction required the District Court to presume that Congress was aware of the judicial interpretation and that the statute incorporated it. *See Merrill Lynch v. Curran,* 456 U.S. 353, 382 n.11 (1982).

Likewise, the Senate's amendment of the bill is presumed to reject the prior language banning all forms of gaming by tribes. *See Russello v. United States,* 464 U.S. 16, 23-24 (1983). Rather than presuming that the two versions were meant to perform the same role, the District Court was bound (in the absence of any evidence to the contrary) to determine what purpose the Senate

amendments were intended to effectuate. The District Court's contention that the change was meaningless is contrary to the rules of construction and common sense.

Finally, rules of construction favoring Indian tribes would dictate against the finding that the Restoration Act was intended to apply Texas civil jurisdiction to the Tribe. Congress is required to employ clear and unequivocal language when it terminates tribal sovereign rights. *See Mattz v. Arnett,* 412 U.S. 481, 504 n.22 (1973). In this case, Congress' purported application of Texas civil jurisdiction over the Tribe is such a radical departure from the established relationship among Indian tribes and the state and federal government that the vague language of section 207 is insufficient to accomplish this purpose. In addition, all statutes affecting Indian rights are to be liberally construed with doubtful expressions resolved in favor of the tribes. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 195 n.5 (1999).

The Fifth Circuit and the District Court deliberating on the rights of Alabama-Coushatta both erred in relying on the dicta set forth in *Ysleta.* That dicta is based on improper hypothesizing of what the decision would be if the court had jurisdiction. That dicta is poor analysis resulting in a wrong decision and an inequitable situation. The dicta of the *Ysleta* decision has been improperly used by the State of Texas against the Alabama-Coushatta to accomplish the political objective rejected by the Senate amendments to the Restoration Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 19, 2003

No. 03 270 AUG 19 2003

IN THE

SUPREME COURT OF THE UNITED STATES

ALABAMA-COUSHATTA TRIBE
OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Filed May 22 2003]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41030

ALABAMA COUSHATTA TRIBE OF TEXAS
Plaintiff - Counter Defendant - Appellant

v.

STATE OF TEXAS; ET AL
Defendants

STATE OF TEXAS
Defendant - Counter Claimant - Appellee

Appeal from the United States District Court
for the Eastern District of Texas,
Lufkin

On Petition For Rehearing En Banc

(Opinion 4/16/03, 5 Cir., _____ , _____ F.3d _____)

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX B

[Filed April 16, 2003]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41030

ALABAMA COUSHATTA TRIBE OF TEXAS,
Plaintiff-Counter Defendant-Appellant,

versus

STATE OF TEXAS; ET AL.,
Defendants,

STATE OF TEXAS,
Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(USDC No. 9:01-CV-299)

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent

[footnote continued]

The Alabama Coushatta Tribe of Texas sought a declaratory judgment that high-stakes gaming activities on tribal lands are lawful and enjoining the State of Texas from interfering with such gaming activities. The State counterclaimed to enjoin the Tribe from conducting gaming on its lands in accord with Section 207 of the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act. *See* 25 U.S.C. §737. The district court ruled in favor of the State, and the Tribe appealed. As we are bound by this court's decision in *Ysleta del Sur Pueblo v. Texas,* 36 F.3d 1325 (5th Cir. 1994), we affirm.

In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act, see 25 U.S.C. §§1300g *et seq.* (regarding the Ysleta del Sur Pueblo) and 25 U.S.C. §§731 *et. seq.* (regarding the Alabama-Coushatta), which restored the trust relationship between the federal government and the tribes. The Act also provided that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the [Alabama Coushatta] tribe." 25 U.S.C. §737(a); *see also* 25 U.S.C. §1300g-6 (prohibiting "[a]ll gaming activities which are prohibited by the laws of the State of Texas" on the lands of the Ysleta del Sur Pueblo).

This court interpreted the meaning of section 1300g-6 in *Ysleta del Sur Pueblo v. Texas.* The Ysleta del Sur Pueblo sued the State of Texas and its governor for refusing to negotiate a compact that would permit the tribe to engage in high-stakes gaming under the Indian

---

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Gaming Regulatory Act (IGRA). *See* 25 U.S.C. §§ 2701-25. The State of Texas argued that 25 U.S.C. § 1300g-6 barred the tribe's suit. After examining the legislative history of the Restoration Act, the court concluded that the Ysleta del Sur Pueblo were prohibited from engaging in any gaming activity prohibited by Texas state law, and that *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), did not alter the ordinary meaning of the term "prohibit" in section 1300g-6.

We are bound by the *Ysleta* court's resolution of the meaning of the language contained in sections 1300g-6 and 737 of Title 25. Although the Alabama Coushatta argue that the *Ysleta* court's interpretation was dictum, and thus not binding upon this court, we disagree. In one of the appeals consolidated in *Ysleta,* the State of Texas asserted that the Restoration Act independently barred the tribe's IGRA suit; thus, the court was required to determine whether the tribe was precluded from seeking relief under the IGRA because the Restoration Act placed greater limits on the tribe's ability to conduct gaming operations. The *Ysleta* court's decision to begin its consideration of the consolidated appeals was not an exercise of hypothetical jurisdiction. The Alabama Coushatta tribe sought a declaratory judgment that high-stakes gaming is permitted on tribal lands, and the district court was bound by the *Ysleta* court's determination that it is not.

"It has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another." *Ryals v. Estelle,* 661 F.2d 904, 906 (5th Cir. Nov. 1981) (per curiam). However sympathetic we may be to the Tribe's argument, we may not reconsider *Ysleta,* even if we believed that the case was wrongly

decided. *See Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355-56 (5TH Cir. 1993), *rev'd en banc on other grounds*, 44 F.3d 334 (5th Cir. 1995). Just as the district court concluded, we are bound by the determination that the Restoration Act precludes the Ysleta del Sur Pueblo and the Alabama Coushatta tribes from conducting all gaming activities prohibited by Texas law on tribal lands.

AFFIRMED.

APPENDIX C

[Filed July 17 2002]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

No. 9:01-cv-299

ALABAMA-COUSHATTA TRIBES OF TEXAS,

Plaintiff,

v.

STATE OF TEXAS, et al.,

Defendants.

FINAL JUDGMENT

On June 25, 2002, this Court issued a Memorandum Opinion and Order, finding that the Alabama-Coushatta Tribe's Entertainment Center operates in violation of the laws of the State of Texas, as made applicable to the Tribe through the provisions of the Restoration Act. The Court therefore issued an injunction barring continuation of the unlawful gambling activities taking place at the Entertainment Center. On June 28, 2002, the Court dismissed the Tribe's Complaint for Declaratory and Injunctive Relief, concluding that the granting of the injunction sought by the State of Texas necessarily foreclosed the relief sought by the Tribe in its Complaint.

It is therefore the final judgment of the Court that the Plaintiff shall take nothing against the Defendants, that this case is DISMISSED, and that the costs of court be borne by the parties incurring same.

SIGNED this 15th day of July, 2002.

/s/ John Hannah, Jr.
John Hannah, Jr.
United States Distict Judge

APPENDIX D

[Filed June 25 2002]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

No. 9:01-cv-299

ALABAMA-COUSHATTA TRIBES OF TEXAS

v.

STATE OF TEXAS

MEMORANDUM OPINION AND ORDER

The States of Texas seeks a Permanent Injunction enjoining the operation of the Alabama-Coushatta Entertainment Center, a Las Vegas style casino that is owned and operated by the Alabama-Coushatta Tribe on Reservation lands located within Polk County, Texas. The Court conducted a trial on the merits from April 1 to April 4, 2002 in Lufkin, Texas, during the course of which the Court accepted exhibits and testimony and invited post-hearing briefs from both parties. After careful consideration, the Court is of the opinion that a permanent injunction should be issued.

The State correctly asserts that the Tribe should be permanently enjoined from operating its casino because (1) under the plain language of the Restoration Act, as

codified in Title 25 of the United States Code, Section 737(a), and Texas law the Tribe is prohibited from conducting casino gambling and (2) the Tribe's resolution not to engage in gaming in exchange for restoration of its federal trust status was incorporated into the Restoration Act.

THE HISTORY AND LANGUAGE OF THE RESTORATION ACT

Prior to 1928, the Republic, and later the State of Texas, maintained a relationship with the Alabama-Coushatta Tribe through a variety of programs. From 1928 to 1954, the Tribe was under federal trust. On August 23, 1954, federal responsibility for lands held in trust by the United States for the Alabama-Coushatta Tribe was terminated pursuant to 25 U.S.C. §721. The Termination Act authorized the Secretary of the Interior to convey to the State of Texas lands held in trust by the United States for the Tribe. The Termination Act went on to authorize the Tribe to convey to the State of Texas lands purchased for and deeded to the Tribe in accordance with an act of the legislature of the State of Texas approved February 3, 1854 so that these lands would be held in trust for the benefit of the Tribe. *See* 25 U.S.C. §721.

In March of 1983, Jim Mattox, who was then the Attorney General of the State of Texas issued Attorney General's Opinion JM-17, which questioned the very existence of the Reservation and Tribe by ruling unconstitutional the trust relationship between the State and the Tribe. In February of 1985, Congressman Ronald Coleman addressed the House of Representatives on his behalf and on behalf of Congressman Charles Wilson, introducing legislation that would restore the federal

trust relationship with the Tigua and Alabama-Coushatta Tribes. On August 18, 1987, after multiple amendments, the Restoration Act was passed into law. The Restoration Act provides:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.[1] Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

25 U.S.C. §737(a). The full text of Alabama-Coushatta Tribal Resolution 86-07, which the Restoration Act expressly incorporates, reads:

> PERTAINING to the Tribal Council exercising its delegated power under Section 1, Article IV, Powers, Constitution and ByLaws of the Alabama-Coushatta Indian Tribe, to manage and protect the land and natural resources of the Tribe.
>
> WHEREAS, on December 16, 1985, the United States House of Representatives passed H.R. #1344, a bill to provide for the restoration of the federal trust relationship to the Alabama-Coushatta Indian Tribe of Texas, and H.R. #1344 is now before the United States Senate for consideration; and,
>
> WHEREAS, after hearings on H.R. #1344 before the House Committee on Interior and Insular Affairs on October 17, 1985, the Comptroller of

---

[1] The Restoration Act provides: "The Alabama and Coushatta Tribes of Texas shall be considered as one tribal unit for purposes of this subchapter and any other law or rule of law of the United States." 25 U.S.C. §732.

Public Accounts for the State of Texas raised concerns that H.R. #1344 would permit the Tribe to conduct high stakes gambling and bingo operations to the detriment of existing charitable bingo operations in the State of Texas and further expressed concerns that the Alabama-Coushatta Tribe would be unable to properly manage such operations in the event the Tribe decided to undertake them, and would therefore become a prime target for organized crime; and,

WHEREAS the Comptroller urged members of the Texas Congressional Delegation to defeat H.R. #1344 unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the Reservation; and

WHEREAS, the Alabama-Coushatta Tribe had no interest in conducting high stakes bingo or other gambling operations on its Reservation, regardless of whether such activities would be governed by Tribal law, state law or federal law; and,

WHEREAS, in response to the concerns voiced by the Comptroller and other officials, the Tribe attempted to insure that H.R. #1344 would give the Tribe no competitive advantage in gaming operations by agreeing to amend H.R. §1344 to provide that any gaming activities on the Reservation would be conducted pursuant to Tribal law that would be required to be identical to state law, and H.R. #1344 was so amended by the House Interior Committee; and,

WHEREAS, some state officials and members of the Texas Congressional Delegation continue to express concern that H.R. #1344, as amended, does not provide adequate protection against high stakes gaming operations on the Reservation; and

WHEREAS, the proposal that H.R. #1344 be amended to make state gaming laws applicable on the Reservation continues to be wholly unsatisfactory to the Tribe in that it represents a substantial infringement upon the Tribes' powers of self-government, is inconsistent with the central purpose of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other Tribes who desire to operate gaming facilities and are presently resisting attempts by states to apply their law to Reservation gaming activities; and

WHEREAS, the Alabama-Coushatta Tribe remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation; and,

WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient;

NOW THEREFORE LET IT BE RESOLVED that the Alabama-Coushatta Tribe respectfully requests its representatives in the United States Senate and House of Representatives to amend Section 207 of H.R. #1344 by striking all of that section as passed by the House of Representatives and substituting in its place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the state of Texas, shall be prohibited on the Tribe's reservation or on Tribal land.

PASSED AND APPROVED this 10th day of March, 1986, and recorded in the minutes of the regular called meeting of the Tribal Council on March 10, 1986.

Alabama-Coushatta Tribal Resolution #86-07.

Governing Law Interpreting the Restoration Act

This Court is not writing on a blank slate. The United States Court of Appeals for the Fifth Circuit, whose decisions are binding on this Court, has expressly addressed the issue of whether tribes governed by the Restoration Act[2] may conduct gambling operations on Reservation lands, concluding that they may not, in *Yselta del Sur Pueblo v. State of Texas,* 36 F.3d 1325 (5th Cir 1994) (*Ysleta I*). The Fifth Circuit's decision was appealed to the United States Supreme Court, which denied certiorari, thereby declining to review the Fifth Circuit's decision. *See Ysleta del Sur Pueblo v. Texas,* 514 U.S. 1016 (1995). Earlier this year, the Fifth Circuit affirmed

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[2]The Fifth Circuit recognized that the Alabama-Coushatta Tribe was not a party to the suit. The Court explained that:

> The Restoration Act restored not only the Ysleta del Sur Pueblo's federal trust status but also the federal trust status of the Alabama and Coushatta Indian tribes. The Act has two titles. Title I, 25 U.S.C. §1300g, concerns the Ysleta del Sur Pueblo, and Title II, 25 U.S.C. §§731-37, concerns the Alabama and Coushatta Indian tribes. The two titles are nearly identical, particularly with regard to the sections concerning gaming. It is important to note that the Alabama and Coushatta Indian tribes are *not* parties to this suit. In fact, these tribes recently voted to *not* engage in casino-style gambling on their reservation. *See* Dianna Hunt, *Indians Defeat Plan for Casino on Reservation,* HOUSTON CHRON., June 16, 1994, at 1A.

Ysleta I, 26 F.3d at 1329 n.3 (emphasis in original).

the issuance of an injunction by the United States District Court for the Western District of Texas, through which the District Court ordered the Ysleta del Sur Pueblo Indians to cease, desist, terminate and refrain from engaging in, permitting, promoting, and conducting activities at the Speaking Rock Casino Entertainment Center operated by the Yselta del Sur Pueblo Indians in El Paso, Texas. *See State of Texas v. Ysleta del Sur Pueblo*, No. 01-51129 (5th Cir. 2002) ("We affirm the judgment of the district court essentially for the reasons stated in its careful, thorough September 27, 2001 Memorandum Opinion.").

The Tribe asks the Court to disregard these prior rulings, arguing that the Fifth Circuit's interpretation of the Restoration Act was dicta, *i.e.* unnecessary to the Fifth Circuit's decision, and therefore is not controlling. Even accepting for the sake of argument that portions of the Fifth Circuit's holding in *Yselta I* are dicta, the Court rejects this approach, believing it to be inconsistent with the United States Supreme Court's teaching that: "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter." *Florida Cent. R. Co. v. Schutte*, 103 U.S. 118, 143 (1880). Moreover, this Court finds itself in agreement with the spirit of the Fifth Circuit's observation in *Nardone v. Reynolds*, 538 F.2d 1131 (5th Cir. 1976), decided nearly one hundred years after the United States Supreme Court decided the *Schutte* case, in which the Fifth Circuit wrote: "To the sometimes veiled suggestion this was a gratuitous statement not necessary to the Court's decision, it is at least considered dicta of hurricane velocity[.]" *Reynolds*, 538 F.2d at 1135 n.11.

In *Ysleta I,* the State of Texas appealed the decision of the United States District Court for the Western District of Texas, challenging the district court's granting of summary judgment in favor of the Ysleta del Sur Pueblo Tribe in its suit against the State of Texas and the Governor for refusing to negotiate a compact that would allow the Tribe to engage in casino-style gambling on its Reservation. The District Court had held that neither the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701-21, nor the Restoration Act, barred the Tribe from engaging in such gambling. The Fifth Circuit held that the Restoration Act, not IGRA governed the dispute and reversed the district court's grant of summary judgment, holding that IGRA did not give the Tribe the right to sue the State of Texas in federal court.

The following analysis from *Yselta I* demonstrates that the Tribe's assertion that the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) was incorporated into the Restoration Act has been explored and rejected in this Circuit.

> In the midst of the 100th Congress' deliberations over the Restoration Act, the Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In that case, two Indian tribes located in California were sponsoring unregulated gaming activities on their reservations. The state of California attempted to enforce against the tribes a state statute regulating bingo operations. The tribes sued, asserting that California had no authority to enforce its gambling laws and regulations on tribal reservations because the United States, which has plenary power over Indian affairs, had not authorized California to do so. California argued that, pursuant to Public Law 280 of 1953, the United States had expressly authorized California to enforce its bingo

statute against the tribes. Public Law 280 specifically granted California authority to (1) enforce its criminal laws on Indian reservations, and (2) hear in its courts civil causes of action in which an Indian is a party. California argued in *Cabazon Band* that its bingo statute was a criminal law which could be enforced on Indian reservations.

The Supreme Court disagreed. The Court began by noting that, while Public Law 280 broadened California's authority with regard to Indian reservations, Congress did not intend to grant it general civil regulatory authority. Public Law 280, the Court reasoned, was narrowly tailored to combat lawlessness on reservations and *not* "to effect total assimiliation of Indian tribes into mainstream American society." *Cabazon Band,* 480 U.S. at 207-08, 107 S.Ct. at 1087. Thus, according to the Court, when a state invokes Public Law 280 to enforce its laws, it must be determined whether the law is "criminal" in nature, and therefore applicable, or "civil" in nature, and therefore inapplicable *except* when the law is relevant to private civil litigation in state court. The question of whether a law is criminal or civil, in turn, depends on the law's practical effect. That is, a state law is criminal, and thus applicable under Public Law 280, if it generally *prohibits* certain conduct, but a state law is civil, and presumptively applicable, if it *regulates* the conduct at issue. *Cabazon Band,* 480 U.S. at 209-10, 107 S.Ct. at 1088.

Applying the criminal-prohibitory/civil-regulatory dichotomy, the Court rejected California's claim that its bingo statute was criminal in nature on the basis that the statute is not a general prohibition on certain conduct. Instead, "the state law generally permits the conduct at issue, subject to regulation." *Id.* at 209, 107 S.Ct. at 1088. The Court analo-

gized California's bingo statute to the state's other gambling statutes, all of which regulate (rather than prohibit) the relevant conduct. The Court concluded that, given the extent to which the state currently regulated gambling, California had no public policy against bingo in particular or gambling in general. *Id.* at 211, 107 S.Ct. at 1089. California therefore could not prohibit the tribes from offering the gaming activities on their reservations.

* * * *

The Tribe argues that Texas does not prohibit the Tribe's proposed gaming activities by pointing to the State's broad definition of a lottery: " 'Lottery' means the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." Tex. Gov't Code Ann. §466.002(3) (Vernon Supp. 1994). The Tribe contends that its proposed gaming activites fall within the State's definition of lottery. That is, like a lottery, the Tribe's proposed gaming activites (i.e., baccarat, blackjack, craps, roulette and slot machines) are all games of prize, chance and consideration. Because the State permits one type of game where the elements are prize, chance and consideration, the State no longer prohibits any other games with the same elements. The State, instead, merely regulates them. Consequently, according to the Tribe, §107(a) of the Restoration Act does not act as an independent bar to the Tribe's proposed gaming activities.

* * * *

[I]n considering the Restoration Act, Congress clearly was concerned with enacting the compromise

between the Tribe, the State and various members of the Texas congressional delegation.

* * * *

[I]f Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty? We thus conclude that Congress did not enact the Restoration Act with an eye towards *Cabazon Band.* Congress was merely acceding to the Tribe's request that the tribal resolution be codified. *See* S. REP. NO. 90 at 8 (the Tribe, "by formal resolution, requested that this legisiation incorporate [its] existing law and custom that forbids gambling").

* * * *

The Tribe's second argument addmittedly raises a closer question. In August 1987, as the Restoration Act was on the brink of final passage in the House of Representatives, a member made the following statement on the floor of the House:

> It is my understanding that the Senate amendments to [§107(a)] are in line with the rational [sic] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify the [the Tribe] the holding and rational [sic] adopted in the Court's opinion in the case.

133 CONG. REC. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall). Standing alone, this statement supports the Tribe's argument that Congress intended to incorporate *Cabazon Band* into the Restoration Act. But we find ourselves confronted with substantial legislative history to the contrary, including the plain language of §107(a), its accompanying report language, and the tribal

resolution to which §107(a) expressly refers. We cannot set aside this wealth of legislative history simply to give meaning to the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration. *See, e.g., Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 648-50, 110 S.Ct. 2043, 1047-48, 109 L.Ed.2d 659 (1990). Rather, upon reviewing these materials, we are left with the unmistakable conclusion that Congress – and the Tribe – intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.

* * * *

The Tribe warns that our conclusion (i.e., that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "[e]very time the State modifies its gambling laws, the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making. The Tribe noted in its resolution that it viewed §107(a) of the Restoration Act as "a substantial infringement upon the Tribes' [sic] power of self-government" but nonetheless concluded that relinquishment of that power was necessary to secure passage of the Act. To borrow IGRA terminology, the Tribe has already made its "compact" with the state of Texas, and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

Yselta I, 36 F.3d at 1329-35 (emphasis in original) (footnotes omitted).

The Fifth Circuit has carefully considered and rejected the Tribe's assertion that the Restoration Act codified the Supreme Court's decision in *Cabazon Band.* The Fifth Circuit has also rejected the argument that the State of Texas may not prohibit gaming on the Tribe's reservation because State law authorizes a lottery and other games of chance. Even in light of testimony presented at trial which shows that Congressman Morris Udall's statement was not a twelfth hour statement and that the games authorized under Texas law are comparable to the games being played in the Tribe's Entertainment Center in some respects, this Court concludes that the well reasoned analysis of the Fifth Circuit controls this case. By affirming the propriety of the injunction issued by the Western District of Texas, in which the district court relied heavily on *Yselta I,* the Fifth Circuit has confirmed the continuing vitality of its analysis irrespective of the Alabama-Coushatta Tribal Council's April 26, 2001 revocation and retraction of Tribal Resolution No. T.C.-86-07. As the Tribe's case hinges on whether or not *Cabazon Band* was incorporated into the Restoration Act, and this Court concludes, based on the plain language of the statute and its interpretation by the Fifth Circuit that it was not, the Court proceeds to whether the Tribe's activities violate Texas law and whether the State is entitled to the relief it seeks.

TEXAS LAW ON GAMBLING

The parties stipulated that the Entertainment Center operated by the Tribe is a place where activities are conducted which violate the provisions of the Texas Penal Code as set forth below. The parties also stipulated that the Tribe intends to continue these activities at the Entertainment Center.

Section 47.02 of the Texas Penal Code, which defines the offense of Gambling, provides, in pertinent part:

(a) A person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest; [or]

(3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chance of winning were the same for all participants.

(c) It is a defense to prosecution under this section that the actor reasonably believed that the conduct:

(1) was permitted under Chapter 2001, Occupations Code;

(2) was permitted under Chapter 2002, Occupations Code;

(3) consisted entirely of participation in the state lottery authorized by the State Lottery Act (Chapter 466, Government Code);

(4) was permitted under the Texas Racing Act (Article 179e Vernon's Texas Civil Statutes); or

(5) consisted entirely of participation in a drawing for the opportunity to participate in a hunting, fishing, or other recreational event conducted by the Parks and Wildlife Department.

Section 47.03 of the Texas Penal Code, which defines the offense of Gambling Promotion, provides, in pertinent part:

> (a) A person commits an offense if he intentionally or knowingly does any of the following acts:
>
> > (1) operates or participates in the earnings of a gambling place;
> >
> > (3) for gain, becomes a custodian of anything of value bet or offered to be bet; [or]
> >
> > (5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

Section 47.04(a) of the Texas Penal Code, which defines the offense of Keeping a Gambling Place, provides:

> (a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.
>
> (b) It is an affirmative defense to prosecution under this section that:
>
> > (1) the gambling occurred in a private place;
> >
> > (2) no person received any economic benefit other than personal winnings; and
> >
> > (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

Section 47.06 of the Texas Penal Code, which defines the offense of Possession of Gambling Device, Equipment, or Paraphernalia, provides, in pertinent part:

> (a) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of a gambling device.
>
> (c) A person commits an offense if, with the intent to further gambling, the person knowingly owns, manufactures, transfers commercially, or possesses gambling paraphernalia.
>
> (d) It is a defense to prosecution under Subsections (a) and (c) that:
>
> > (1) the device, equipment, or paraphernalia is used for or is intended for use in gambling that is to occur entirely in a private place;
> >
> > (2) a person involved in the gambling does not receive any economic benefit other than personal winnings; and
> >
> > (3) except for the advantage of skill and luck, the chance of winning is the same for all participants.
>
> (f) It is a defense to prosecution under Subsection (a) or (c) that the person owned, manufactured, transferred, or possessed the gambling device, equipment, or paraphernalia for the sole purpose of shipping it to another jurisdiction where the possession or use of the device, equipment, or paraphernalia was legal.

Additionally, section 125.001 of the Texas Civil Practice and Remedies Code, which relates to Common Nuisances, provides, in pertinent part,

> (a) A person who knowingly maintains a place to which persons habitually go for the following purposes maintains a common nuisance:
>
> (1) prostitution or gambling in violation of the Penal Code[.]

Section 125.041(1) of the Texas Civil Practice and Remedies Code, which relates to Public Nuisances, provides, in pertinent part,

> For the purposes of this subchapter, a public nuisance is considered to exist at a place if one or more of the following acts occurs at the place on a regular basis:
>
> (1) gambling, gambling promotion, or communication of gambling information, as prohibited by Chapter 47, Penal Code[.]

FINDINGS OF FACT

Based on the uncontested evidence presented at trial, including a video tape showing the activities at the Entertainment Center, and the parties' Joint Stipulations, the Court finds that the activites of the Alabama-Coushatta Tribe at the Tribe's Entertainment Center constitute violations of Texas law, which operates as surrogate federal law on the Tribe's reservation in Texas. Specifically, in running the Entertainment Center, the Tribe is committing violations of Texas Penal Code §§ 47.02(a)(1) & (3), 47.03(a)(1), (3), & (5), 47.04(a), and 47.06(a) & (c)). Facts do not exist which would give rise to the defenses provided by these statutes. Additionally, the Court finds that the Entertainment Center is a Common and Public Nuisance, as these terms are defined by sections 125.001(a)(1) and 125.041(1) of the Texas Civil Practice and Remedies Code.

INJUNCTIVE RELIEF

"When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fill the legislative purpose." *United States v. Buttorff*, 761 F.2d 1056, 1059 (5th Cir. 1985). The Restoration Act specifically provides that any violations of its prohibition on gaming activities shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. *See* 25 U.S.C. §737(a). The Restoration Act also provides "nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." 25 U.S.C. §737(c). Additionally, section 125.022(a) of the Texas Civil Practice and Remedies Code authorizes the Attorney General to sue to enjoin the use of places constituting a Public Nuisance.[3] The injunction sought by the State of Texas is authorized by both state and federal statutes.

A party seeking injunctive relief must show (1) actual success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the potential harm from the injunction to the defendant; and (4) the public interest will not be jeopardized by the grant of the injunction. *See Buttorff*, 761 F.2d at 1059 n.3. *See also Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). Because Texas' gaming laws and regulations operate as surrogate federal law on

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[3] "A district, county, or city attorney, the attorney general, or a citizen of the state may sue to enjoin the use of a place for purposes constituting a nuisance under this subchapter." Tex. Civ. Prac. & Rem. Code §125.022(a) (Vernon 2002).

the Tribe's Reservation in Texas and the State has shown that Texas gaming laws are being violated at the Tribe's Entertainment Center, the State has succeeded on the merits.

The Fifth Circuit "recognize[s] that '[a]s a general rule, courts are reluctant to issue injunctions against the commission of a crime,' although 'if the court finds that the prosecution of the criminal charge is not an adequate remedy, as when the conduct is creating a widespread public nuisance . . . the fact that a crime is involved should not prevent the court from entering an injunction.' " *Buttorff*, 761 F.2d 11 at 1063 (*citing* Wright & Miller, *Federal Practice and Procedure: Civil* §2942 at 386-87). The Texas Civil Practice and Remedies Code's definition of a Public Nuisance encompasses gaming and gambling, as such terms are defined by chapter 47 of the Texas Penal Code. Criminal prosecution on a case by case basis would be unduly burdensome given that the activities at the Entertainment Center constitute a Public Nuisance.

The Tribe opened its Entertainment Center in late November of 2001. Two months earlier, the United States District Court for the Western District of Texas interpreted the Restoration Act as making gambling unlawful on the Tribal Reservation lands of the Ysleta del Sur Pueblo Tribe. The Fifth Circuit and the parties to this case recognize that the Ysleta del Sur Pueblo and Alabama-Coushatta Tribes are affected by two titles of the United States Code which are nearly identical, particularly with regard to the sections concerning gaming. The Tribe had fair warning when it opened its Entertainment Center, that continued operation was problematic. Tribal Chairman Kevin Battise testified that the Tribe made enough money in the four months

between when it opened the Entertainment Center and the trial that the Tribe could repay the moneys it borrowed to open the Entertainment Center. Nearly three months have passed since the trial, during which, the Court presumes, the Tribe has continued to profit from its unlawful enterprise. The Court therefore concludes that the threatened injury of continuing operation of the Entertainment Center to the State outweighs the potential harm to the Tribe and that the public interest is not jeopardized by the granting of an injunction against an enterprise that was unlawful from its inception.

If the Tribe wishes to operate an Entertainment Center on its Reservation, its recourse lies with the legislatures of the United States and the State of Texas. A change in the law, not an undoing of determinations made by the United States Court of Appeals for the Fifth Circuit, will allow the Tribe to conduct gambling activities on its Reservation. In making this observation, the Court is not expressing any views regarding whether a change in the law is appropriate.

For the foregoing reasons, the Alabama-Coushatta Tribe, its Tribal Counsel and all persons acting by, through or under the Tribe and its Tribal Council are ORDERED to cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in gaming and gambling activities on the Tribe's Reservation which violate State law. The Court GRANTS the Tribe thirty (30) days within which to bring itself into full and complete compliance with its injunction.

SIGNED this 25th day of June, 2002.

/s/ John Hannah, Jr.
John Hannah, Jr.
United States District Judge

APPENDIX E

[Filed Nov 21 2001]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

Judge Hannah

Civ. No. 9:01 cv 299

ALABAMA-COUSHATTA TRIBES OF TEXAS,

Plaintiff,

v.

DEFENDANT 1: STATE OF TEXAS, DEFENDANT 2: JOHN CORNYN, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS; DEFENDANT 3: STATE OFFICIAL JOHN DOE; DEFENDANT 4: STATE OFFICIAL JANE DOE

Defendants

ALABAMA-COUSHATTA TRIBES OF TEXAS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMPLAINT

Alabama-Coushatta Tribes of Texas alleges on its own behalf, and on behalf of its entire tribal membership, by and through its undersigned counsel, and pleads against Defendants State of Texas; John Cornyn, in his capacity as Attorney General for the State of Texas; State Official John Doe; and State Official Jane Doe, as follows:

INTRODUCTION

1. This is an action by the federally recognized Alabama-Coushatta Tribes[1] seeking a determination of their rights and remedies under the provisions of the Ysleta del Sur Pueblo and Alabana-Coushatta

[1] Please note that although the official name of Plaintiff includes the plural "Tribes," it is a single Tribe as a tribal government recognized by federal law. Accordingly, at first blush the grammar may appear incorrect, even though it properly treats "Tribes" as a single entity.

Indian Tribes of Texas Restoration Act, P.L. 100-89, 25 U.S.C. §§731 *et seq.* (Restoration Act), the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 *et seq.* ("IGRA"), or otherwise under federal law. The Alabama-Coushatta Tribes seeks injunctive relief that allows the Alabama-Coushatta Tribes to govern gaming activites on its Indian lands, free from interference from Defendants.

2. This action seeks a Declaration that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribes' Indian lands, and may authorize and regulate ,forms of gaming which (1) are not contrary to the public policy of the State of Texas as set forth by the United States Supreme Court in *California v. Cabazon Band of Mission Indians et al.* 480 U.S. 202 (1987); or (2) are forms of gaming that the State of Texas has not reasonably characterized as completely and affirmatively prohibited for any purpose by any person, organization or entity, including the State of Texas; or (3) are not prohibited by the laws of the State of Texas. These three options are plead in the alternative based on plausible interpretation of the federal statutes at issue.

3. The Restoration Act, signed into law August 18, 1987, clarified that Alabama-Coushatta Tribes is a federally recognized Indian Tribe possessing the sovereign authority to govern. The date of enactment fell between the landmark Supreme Court decision in *Cabazon Band,* issued February 25, 1987, and the date of enactment of IGRA, which became law on October 17, 1988. At issue in this action is the applicability and interpretation of these two statutes and other affected federal laws.

4. The Defendant State of Texas, particularly through the actions of the Defendant Attorney General, threatens to deprive the Alabama-Coushatta Tribes of tribal sovereign and statutory gaming rights and/or privileges. The Alabama-Coushatta Tribes is entitled to injunctive relief prohibiting the State of Texas or any entity from interfering with the Tribes' gaming operation.

5. Congress did not intend, and federal courts may not interpret the Restoration Act in a manner that allows the State of Texas to fundamentally change its laws and public policy to allow for a multifaceted and thriving gaming industry and still deprive the Alabama-Coushatta Tribes of exercising its inherent and soversign and statutory gaming rights on its Indian lands.

JURISDICTION

6. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1362, which governs controversies involving an Indian Tribe. The matter in controversy arises under the 28 U.S.C. §§1331. The action is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202. The action seeks declarations regarding the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act, P.L. 100-89, 25 U.S.C. §§731 *et seq.*, and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 *et seq.* ("IGRA"), each of which provide for the exclusive jurisdiction of the federal courts. The declarations are sought in the context of the facts and circumstances surrounding the enactment of the two statutes and the fundamental shift in Texas' policy regarding gaming.

7. Jurisdiction over the individual agents of the State of Texas, in their official capacities, is invoked pursuant to the *ex Parte Young,* 209 U.S. 123 (1908) exception to Eleventh Amendment immunity. Jurisdiction over Defendant State of Texas is subject to the consent of the State.

8. Upon information and belief, Plaintiff Tribe alleges that Defendants have announced to media sources that Texas will directly interfere with the Tribes' exercise of its sovereign and statutory rights to offer certain gaming activities on Tribal lands. The imminent threat and considerable damage to the Tribe's governance provides a justicable case and controversy per Article III of the United States Constitution.

VENUE

9. Venue is in the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. §1391.

PARTIES

10. The Plaintiff is the Alabama-Coushatta Tribes of Texas ("Tribe" or "Tribes" or "Alabama-Coushatta Tribes"), a federally recognized Indian Tribe restored to federal recognized status by the Restoration Act, possessing the sovereign and statutory powers to govern activities on its Indian lands, including its Reservation, the external boundaries of which lie in Polk County with tribal headquarters located on the Alabama-Coushatta Reservation. The Tribe exercises jurisdiction over said Indian lands within the State of Texas.

11. Defendant 1, State of Texas is a body politic existing pursuant to its relationship with the government of the United States. Agents acting in their capacity as officials of such body politic subjects the State to this action to the extent the United States has imposed a government-to-government relationship between the Tribal government and the State government.

12. Defendant 2, John Cornyn is and at all times pertinent was the Attorney General of the State of Texas. The Office of the Attorney General has taken actions that pose a direct and immediate threat to Plaintiff Tribe. Upon information and belief, Plaintiff asserts that Defendant John Cornyn is poised to take action against the interests of the Alabama-Coushatta Tribes.

13. Defendants 3, State Official John Doe and 4, State Official Jane Doe are officials of the State of Texas who may be necessary in order for the court to construct a remedy consistent with its Declarations. The Plaintiff Tribe will amend or seek to amend the pleadings to include such officials as parties as their identity becomes known.

GENERAL ALLEGATIONS

14. The Alabama-Coushatta Tribes is comprised of approximately 1,100 direct descendants of the mound building cultures that occupied the Southeast United States since time immemorial. 513 members of the Tribe reside on the Tribes' current Reservation. Many of those look to the Tribe to provide services and opportunity. Many of the Tribes' members no longer residing on the Reservation have left because of the lack of opportunity.

Those employed off the Reservation commute as far as 60 miles. Numerous efforts to foster economic development have not succeeded. The Tribal membership is currently suffering a 48% adult unemployment rate. Only 1% of Tribal members on the reservation have a 4-year college degree. Health conditions should be far better, 147 members are diagnosed to be diabetic. Median Household income of the Alabama-Coushatta is $10,809.

15. The Tribe is responsible for stewardship of its 4,593 acre Reservation, the external boundaries of which fall within Polk County of the State of Texas. The land lies in the Big Thicket area and is generally unsuitable for raising crops or grazing cattle. The Tribes' initial Reservation comprises 5,528,570 acres, 2,850,028 acres of which the Tribe was wrongfully dispossessed by the United States and 2,677,423 acres of which the Tribe was wrongfully dispossed by the political entity of Texas. However, this Declaratory Judgement Action only seeks declaration of the Tribes' rights regarding the acreage currently held by the United States in trust for the benefit of the Tribe.

16. The Alabama-Coushatta Tribal government's obligations and responsibilities cover a broad range of governmental services, including but not limited to education, housing, land and resource management, environmental protection, health care including emergency ambulance service and the Chief Kina Health Clinic, lake management, forestry, social services, fire protection, solid waste management, security, cultural preservation, as well as government administration and procurement. The Tribe needs to generate revenues to properly fund its

governmental services and administration – without gaming revenues, the Tribes' ability to adequately function as a government is in serious jeopardy.

17. By means of the Restoration Act of 1987, the Tribes were restored to federally recognized status. All rights and privileges of the Tribe and its members under any federal treaty, Executive Order, agreement, statute or under any other authority which may have been diminished or lost under the Termination Act of 1954, 25 U.S.C. §§721 *et seq.* have been restored to the Tribes. Federally recognized status is recognition that the Tribe is a distinct political society, capable of managing its own affairs and governing itself, having territorial boundaries within which the Tribes' authority of self-government is exclusive. Federally recognized Tribes retain sovereign authority to regulate their internal and social relations, including the power to make their own substantive law in internal matters and to enforce that law in their own forums.

18. In 1986, amidst a national scenario where several tribes were offering commercial gaming on their lands, while litigation regarding the sovereign authority of federally recognized tribes to govern gaming activities was working its way through the courts, certain members of Congress threatened to block passage of the Restoration Act unless the Tribe agreed to language that would forever prevent the Tribe from offering any gaming activities on its lands. Under duress, the Tribe was coerced into passing a Resolution that supported certain language, which if passed into law, would have precluded the Tribe from offering any gaming. But

Congress did not pass any bill regarding the Tribe's restoration in 1986 and the 1987 Congress rejected the language supported by the Tribe's resolution when it adopted the Restoration Act. The Tribe has since rescinded the Resolution.

19. On February 25, 1987, prior to the passage of the Restoration Act, the United States Supreme Court, in *Cabazon*, clarified that Indian Tribes have always possessed the inherent sovereign authority to govern gaming activities on Indian lands, and that Tribes could lawfully offer gaming activities which do not contravene a State's public policy towards gaming.

20. At the time of the passage of the Restoration Act, application of the *Cabazon* decision to Texas' public policy towards gaming rendered little or no gaming opportunities for Tribes with Indian lands within the external boundaries of the State of Texas because, inter alia, the State Constitution prohibited "Lottery" schemes, meaning any gaming activity with the elements of prize, chance, and consideration.

21. Texas' public policy regarding gaming changed to some degree in 1989 when the State Constitution was amended to allow for certain raffle games, and then underwent a monumental change in 1991 when Article 3, §47 of the Texas State Constitution was changed to allow for the State to engage in games with "Lottery" schemes. Since these changes in Texas State public policy, application of the *Cabazon* decision to Texas public policy renders substantial and multi-faceted gaming opportunities for the Tribe.

22. The facts and circumstances surrounding the passage of the Restoratin Act, when fully and thoroughly considered, do not support a conclusion that Congress intended to deprive the Tribe of its sovereign and inherent authority over gaming activities. Indeed, the facts and circumstances demonstrate that Congress intended to preserve the Tribes' authority such that it would not be precluded from offering gaming activities in the event that Texas State public policy were to change in the future.

23. By official Referendum of the Tribes on October 21, 1999, the General Council of the Tribe voted overwhelmingly for the Tribe to offer gaming activities as a critical source to generate badly-needed tribal governmental revenues. Pursuant to this mandate, the Tribal Council (1) enacted a Gaming Ordinance to authorize and regulate gaming activities on its Indian lands, (2) established a Gaming Agency to regulate gaming activities in a manner that preserve the integrity and honesty of the games, and (3) directed tribal officials to proceed with the construction of an entertainment facility on its Indian lands, to offer a large variety of gaming activities.

24. The Entertainment Facility is now open for members of the Tribes' private gaming club. The Entertainment Facility is not open to non-members. The Entertainment Facility is authorized to offer gaming activities which contain the elements of prize, consideration and chance. The Entertainment Facility is authorized to utilize a broad range of dispensers, electronic or electro-mechanical aids and gambling devices including but not limited to random number generators, electronic ticket dispensers, electronic pull tabs, spinning reel slots, and video lottery devices.

25. The Tribe's Reservation and lands of the Tribe are a private place to which non-members of the Tribe may attain access only by invitation of the Tribe.

26. The public policy of the State of Texas is to promote and protect commercial, high-stakes gaming, allowing for extensive exposure to a great variety of gaming opportunities for residents and visitors throughout the State. The State of Texas sanctions and promotes a broad range of commercial and casino gaming activities, including a multifaceted State Lottery, an extensive pari-mutuel horse racing industry, an extensive commercial "slot parlor" market, charitable carnival or casino nights, high-stakes bingo, raffles, casino "cruises-to-nowhere," and widespread use of "amusement devices," which are slot machines that require a modicum of skill.

27. Pleading in the alternative, the State of Texas has embraced a policy of willful blindness or deliberate non-enforcement as thousands of video "eight-liner" games are placed in hundreds of establishments throughout the State of Texas, such that the public policy of the State is to allow for such private, non-governmental "Lottery" games.

28. The Texas State Lottery and the Texas State Horse Racing Commission each have the regulatory/discretionary authority to offer a wide variety of games on gambling devices. Such gambling devices within their authority possess the same fundamental characteristics as the gambling devices authorized by the Tribe. If there are differences, there is no reasonable characterization of the difference that renders devices authorized by the Tribe "prohibited" by the laws of the State of Texas.

29. The State allows for the same gaming activities authorized by the Tribe for some entities for some purposes, such that the games cannot be characterized as "prohibited" by the laws of the State of Texas.

30. The State cannot reasonably characterize any gaming activity authorized by the Tribe as a form of gaming activity distinct from those gaming activities authorized by the State.

31. The games authorized by the Tribe do not contravene the State of Texas' public policy regarding gaming.

32. The Attorney General for the State of Texas has responded to communication initiated by the Tribe that the position of his office is that the Tribe's offering of gaming is unlawful. The Attorney General and members of his staff have been quoted in newspapers stating that the Attorney General will take action designed to directly interfere with and impede the Tribe's exercise of its sovereign and statutory authority over gaming activities on the Tribe's Indian lands.

33. The Attorney General and his agents have attempted to deprive the Alabama-Coushatta Tribes of their day in court by subjecting it to a district court decision in another federal district in which the Alabama-Coushatta Tribes are not a party, and misapplying non-binding dictum in an appellate court case. Additionally, the Tribe that was a party to that litigation has yet to be able to have the federal court give proper consideration of a thorough record of the facts and circumstances surrounding the passage of the Restoration Act and the gaming activities available in the State of Texas.

34. The Alabama-Coushatta Tribes and its members will incur irreparable harm, not compensable by monetary damages, if games and gambling devices of any sort remain unavailable for play. Such harm includes but is not limited to: (1) interference with the Tribe's rights to self-governance; (2) interference with the exercise of the Tribe's inherent sovereign gaming rights including the exclusive right to regulate gaming activities on tribal lands; (3) an erosion of public confidence in the gaming operation in the face of continued challenges and threats regarding the authority of the Tribe to offer the games at issue; (4) loss of economic opportunity, that plead in the alternative, is not compensable against the State of Texas or the United States, and will never be recovered; (5) loss of desperately needed tribal governmental revenues to properly fund Tribal programs; and (6) furthering and promoting the scheme of the State of Texas to deprive Tribes of their gaming rights through tactics of intimidation and delay in an effort to intimidate and unduly influence decisions of sovereign tribal governments.

TRIBE'S CLAIM FOR RELIEF: DECLARATORY JUDGMENT & INJUNCTIVE RELIEF

35. Paragraphs 1 through 34 are incorporated herein by reference.

36. Congress did not intend, and federal courts may not interpret the Restoration Act in a manner that allows the State of Texas to fundamentally change its laws and public policy to allow for a multifaceted and thriving gaming industry and still deprive the Alabama-Coushatta Tribes of exercising its inherent

and sovereign and statutory gaming rights on its Indian lands.

37. In contrast to the irreparable harm suffered by the Tribe if the State is allowed to interfere, the State will not suffer any irreparable harm if the State is prevented from interfering with the Alabama-Coushatta Tribes exercising its inherent and sovereign and statutory gaming rights on its Indian lands.

38. The Alabama-Coushatta Tribes is entitled to a Declaration that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming which are not contrary to the public policy of the State of Texas as set forth by the United States Supreme Court in *California v. Cabazon Band of Mission Indians et al.* 480 U.S. 202 (1987).

39. Plead in the alternative, The Alabama-Coushatta Tribes is entitled to a Declaration that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming which are forms of gaming that the State of Texas has not reasonably characterized as completely and affirmatively prohibited for any purpose by any person, organization or entity, including the State of Texas.

40. Plead in the alternative, The Alabama-Coushatta Tribes are entitled to a Declaration that the Alabama-Coushatta Tribes possess authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming, which are not prohibited by the laws of the State of Texas, meaning that if the gaming activity is

allowed for any entity under any circumstance, it can not be deemed "prohibited" in the context of the Restoration Act.

41. In the event the Court provides any of the three Declarations set forth in paragraphs 38 - 40, or any comparable Declaration, the appropriate remedy is to issue an injunction precluding the State of Texas from interfering with the governance decisions of the Alabama-Coushatta Tribes regarding gaming.

PRAYER FOR RELIEF

WHEREFORE, the Alabama-Coushatta Tribes of Texas respectfully prays this honorable court for:

1. An Order declaring that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming which are not contrary to the public policy of the State of Texas as set forth by the United States Supreme Court in *California v. Cabazon Band of Mission Indians et al.* 480 U.S. 202 (1987);

2. An Order declaring that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming that the State of Texas has not reasonably characterized as completely and affirmatively prohibited for all purposes by any persons, organizations or entities, including the State of Texas.

3. An Order Declaring that the Alabama-Coushatta Tribes possesses authority to regulate gaming activities on the Tribe's Indian lands and may authorize and regulate forms of gaming, which are not pro-

hibited by the laws of the State of Texas, meaning that if the gaming activity is allowed for any entity under any circumstance, it can not be deemed "prohibited" in the context of the Restoration Act.

4. An Order enjoining the State of Texas and all Defendants from taking any action that would interfere with the Alabama-Coushatta Tribes' governance over gaming activities on its Indian lands; specifically, an Order preventing Defendants from taking any action to prevent or impede the Tribe from offering gaming activities consistent with the Declarations of law.

5. In the event the State threatens actions other than seeking an Order of this Court against the Tribe, the Tribe pray for this Court to issue a preliminary injunctive relief that prevents Defendants from taking any action to prevent or impede the Tribe from offering gaming activities pending the Court's final decision on the Declarations of law sought herein.

6. Permanent injunctive relief precluding the State of Texas from interfering with the governance decisions of the Alabama-Coushatta Tribes regarding gaming consistent with the Declarations of Law.

7. An award to the Alabama-Coushatta Tribes of such other and further relief as this Court deems just under the circumstances.

8. An award of attorneys' fees and costs.

DATED: NOVEMBER 21, 2001

Respectfully submitted

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APPENDIX F

ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS RESTORATION ACT

(25 U.S.C. §§731, *et seq.*)

[25 U.S.C.A. §731]

31. Definitions.

For purposes of this subchapter –

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 732 of this title);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushetta Indian Reservation in Polk County, Texas, comprised of –

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 721 of this title;

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

[25 U.S.C.A. § 732]

32. Alabama and Coushatta Indian Tribes of Texas considered as one tribe.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this subchapter and any other law or rule of law of the United States.

[25 U.S.C.A. § 733]

33. Restoration of the Federal trust relationship; Federal services and assistance.

(a) Federal trust relationship

The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984) [25 U.S.C.A. § 461 *et seq.*], and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

(b) Restoration of rights and privileges

All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been dimished or lost under the Act approved August 23, 1954 [68 Stat. 768; 25 U.S.C.A. §721 *et seq.*], are hereby restored and such subchapter shall not apply to the tribe or to members of the tribe after August 18, 1987.

(c) Federal benefits and services

Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after August 18, 1987, for all benefits and service furnished to federally recognized Indian tribes.

(d) Effect on property rights and other obligations

Except as otherwise specifically provided in this subchapter, the enactment of this subchapter shall not affect any property right or obligation or any contractual right or obligation in existence before August 18, 1987, or any obligation for taxes levied before such date.

[25 U.S.C.A. §734]

34. State and tribal authority.

(a) State authority

Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) Current constitution and bylaws to remain in effect

Subject to the provisions of section 733(a) of this title, the constitution and bylaws of the tribe on file with the Committee on Natural Resources of the House of Representatives is hereby declared to be approved for the purposes of section 476 of this title except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) Authority and capacity of Tribal Council

No provision contained in this subchapter shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b) of this section. The Tribal Council shall represent the tribe and its members in the implementation of this subchapter and shall have full authority and capacity –

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 735 of this title as the successor in interest to the Tribal Council.

[25 U.S.C.A. §735]

35. Adoption of new constitution and bylaws.

Upon written request of the tribal council,[1] the Secretary shall hold an election for the members of the tribe for the purpose of adopting a new constitution and bylaws in accordance with section 476 of this title.

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[1] So in original. Probably should be "Tribal Council,".

[25 U.S.C.A. §736]

36. Provisions relating to tribal reservation.

(a) Federal reservation established

The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) Conveyance of land by State

The Secretary shall –

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) Conveyance of land by tribe

At the written request of the Tribal Council, the Secretary shall –

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) Approval of deed by Attorney General

Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) Permanent improvements authorized

Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvemtns of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

[25 U.S.C.A. § 737]

37. Gaming activities.

(a) In general

All gaming activites which are prohibited by the laws of the State of Texas are hereby prohibited on the reser-

vation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 736(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any members of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

APPENDIX G

[36 F.3d 1325]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 93-8477, 92-8823 and 94-50130

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS and Ann Richards, Governor
Defendants-Appellants.

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS and Ann Richards, Governor,
Defendants-Appellants.

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS and Ann Richards, Governor
Defendants-Appellants.

Oct. 24, 1994
Rehearing Denied Nov. 21, 1994
in Nos. 93-8477, 93-8823

Toni Hunter, Asst. Atty. Gen., Dan Morales, Atty. Gen., Austin, TX, for appellants.

Tom Diamond, Ronald Jackson, John R. Batoon, Thomas M. Diamond, Jr., El Paso, TX, for appellee.

Thomas F. Gede, Sp. Asst. ATTY' Gen., Sacramento, CA, amicus curiae.

Dickstein & Merin, Howard L. Dickstein, Frank R. Lawrence, Sacramento, CA, amicus curiae.

Thomas M. Diamond, Jr., El Paso, TX, for appellee in No. 94-50130.

Appeals from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA, DeMOSS, and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

Pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701-21, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe located near El Paso, Texas, sued the state of Texas ("State") and its governor for refusing to negotiate a compact that would permit the Tribe to engage in casino-type gambling on its reservation. Having concluded that neither IGRA nor the Restoration Act, 25 U.S.C. § 1300g, barred the Tribe from engaging in such gambling, the district court granted the Tribe summary judgment. We hold that the Restoration Act, not IGRA, governs

this dispute and does not give the Tribe the right to sue the State in federal court. We therefore reverse the district court's summary judgment for the Tribe and remand with instructions to dismiss the Tribe's suit.

I.

Before analyzing the State's appeals, we first provide some background on the Restoration Act, IGRA, and the procedural history of this case.

A.

In 1968, the federal government recognized the Tiwa Indians[1] of the Ysleta del Sur Pueblo as an Indian tribe but simultaneously transferred responsibility for the Indians to the state of Texas. *See* Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). Although the Tiwa Indians Act constituted legal recognition of the Indians, it had no practical effect on the relationship between the federal government and the Tribe because "[t]he Tribe had not been subject to federal supervision and had received no federal Indian services before the 1968 Act, and that status continue [sic] after its enactment." S. REP. NO. 90, 100th Cong., 1st Sess. 7 (1987). Instead, Texas administered the Tribe's affairs, which included holding the Tribe's 100-acre reservation in trust and providing economic development funds to the Tribe. H.R. REP. NO. 36, 100th Cong., 1st Sess. 2 (1987). Furthermore, the Tiwa Indians Act expressly recognized that the Tiwa Indians were "subject to all

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[1] Prior to passage of the Restoration Act, the Ysleta del Sur Pueblo were known as the Tiwa Indians. Section 102 of the Restoration Act officially changed the name of the Tribe. 25 U.S.C. §1300g-1.

obligations and duties [as] citizens under the laws of the [s] tate of Texas." *See* Tiwa Indians Act.

In 1983, however, Texas became concerned that its trust relationship with the Tribe violated state constitutional law. H.R. REP. NO. 36, at 2. Consequently, the United States and the Tribe began the process of granting the Tribe federal trust status. In December 1985, the House of Representatives of the 99th Congress passed H.R. 1344, a bill to restore the trust relationship between the United States and the Tribe. With reaard to gaming activities, § 107 of H.R. 1344 provided:

> Gaming, lottery or bingo on the tribe's reservation and on tribal lands shall only be conducted pursuant to a tribal ordinance or law approved by the Secretary of the Interior. Until amended as provided below, the tribal gaming laws, regulations and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo.

131 Cong.Rec. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Notwithstanding § 107, various state officials and members of Texas' congressional delegation still were concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation. Believing that restoration of their federal trust status was more important than exercising the option to operate gaming operations, the Tribe approved Resolution No. TC-02-86 in March 1986.[2] The resolution represented a poli-

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[2] Because of its critical importance to our resolution of this case, we re-print, with emphasis in certain portions, Resolution No. TC-02-86:

> WHEREAS, on December 16, 1985, the United States House of Representatives passed H.R. 1344, a bill to provide for the

[footnote continued]

tical accommodation between the Tribe, the state of Texas, and various members of Texas' congressional delegation. The Tribe clearly viewed the applicability of state gaming laws on its reservation as an infringement on

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restoration of the federal trust relationship to the Ysleta del Sur Pueblo (Tigua Indian Tribe of Texas), and H.R. 1344 is now before the United States Senate for consideration, and,

WHEREAS, after hearings on H.R. 1344 before the House Committee on Interior and Insular Affairs on October 17, 1985, the Comptroller of Public Accounts for the State of Texas raised concerns that H.R. 1344 would permit the Tribe to conduct high stakes gambling and bingo operations to the detriment of existing charitable bingo operations in the State of Texas; and,

WHEREAS, the Comptroller urged members of the Texas Congressional Delegation to defeat H.R. 1344 unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the reservation; and,

WHEREAS, *the Ysleta del Sur Pueblo has no interest in conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law; and,*

WHEREAS, in response to the concerns voiced by the Comptroller and other officials, the Tribe attempted to insure that H.R. 1344 would give the Tribe no competitive advantage in gaming operations by agreeing to amend H.R. 1344 to provide that any gaming activities on the reservation would be conducted pursuant to tribal law that would be required to be identical to state law, and H.R. was so amended by the House Interior committee; and,

WHEREAS, some state officials and members of the Texas congressional delegation continue to express concern that H.R. 1344, as amended, does not provide adequate protection against high stakes gaming operations on the reservation; and,

WHEREAS, the proposal that H.R. 1344 be amended to make state gaming law applicable on the reservation continues to be wholly unsatisfactory to the Tribe in that it represents a substantial infringement upon the Tribes' power of

[footnote continued]

its sovereignty. But to ensure passage of the restoration legislation, the Tribe urged Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." The distinction between the language in §107, as passed by the House, and the Tribe's suggested language is that §107 provided the Tribe with the option to deviate from Texas' gaming laws *if* the Tribe petitioned the secretary of Interior, the secretary approved, and Congress did not overrule the

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self government, is inconsistent with the central purposes of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other tribes who desire to operate gaming facilities and are presently resisting attempts by State to apply their law to reservation gaming activities; and,

WHEREAS, *the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation;* and,

WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, *the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient.*

NOW, THEREFORE, BE IT RESOLVED, that the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§107(a) of the Restoration Act] by striking all of that section as passed by the House of Representatives and *substituting in its place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land.*

secretary. The Tribe's suggested language, on the other hand, established that Texas law with regard to gaming would effectively operate as surrogate federal law. The resolution also clearly indicates that the Tribe, at the time of the resolution's adoption, "ha[d] no interest in conducting high stakes bingo or other gambling operations on its reservation" and "remain[ed] firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation."

The Senate of the 99th Congress incorporated the Tribe's suggested language. Section 107 of H.R. 1344, as passed by the Senate in September 1986, provided that "[g]aming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands." 132 CONG. REC. S13634 (daily ed. Sept. 25, 1986) (text of H.R. 1344 as passed by the Senate). Shortly thereafter, however, the Senate vitiated action on H.R. 1344, *see* 132 CONG. REC. S13735 (daily ed. Sept. 25, 1986), whereupon the bill died.

The restoration legislation was reintroduced as H.R. 318 in the 100th Congress, and the House passed the bill in April 1987. Section 107 of H.R. 318 provided that, "[p]ursuant to Tribal Resolution T.C.-02-86 which was approved and certified on March 12, 1986, all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal land." 133 CONG. REC. H2051 (daily ed. April 21, 1987) (text of H.R. 318 as passed by the House). The Senate approved H.R. 318 in July 1987. The Senate amended §107 to read:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any vi

> lation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

133 CONG. REC. S10568 (daily ed. July 23, 1987) (text of H.R. 318 as passed by the Senate). According to the Senate Report accompanying the legislation, the only difference between §107 as passed by the Senate and §107 as passed by the House was that the Senate version "expand[s] on the House version to provide that anyone who violates the federal ban on gaming contained in [§107] will be subject to the same civil and criminal penalties that are provided under Texas law." S.Rep. No. 90, 100th Cong., 1st Sess. 8-9 (1987). Otherwise, the report stated, the "central purpose" of the two versions was the same: "to ban gaming on the reservations as a matter of federal law." *Id.* at 8. The House concurred in the Senate's amendments in August 1987, *see* 133 Cong. Rec. H6972 (daily ed. Aug. 3, 1987), whereupon H.R. 318 became public law 100-89. Section 107 of the Restoration Act is now codified at 25 U.S.C. §1300-g.[3]

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[3] The Restoration Act restored not only the Ysleta del Sur Pueblo's federal trust status but also the federal trust status of the Alabama and Coushatta Indian tribes. The Act has two titles. Title I, 25 U.S.C. §1300g, concerns the Ysleta del Sur Pueblo, and Title II, 25 U.S.C. §§731-37, concerns the Alabama and Coushatta Indian tribes. The two titles are nearly identical, particularly with regard to the sections concerning gaming. It is important to note that the Alabama and Coushatta Indian tribes are *not* parties to this suit. In fact, these tribes recently voted to *not* engage in casino-style gambling on their reservation. *See* Dianna Hunt, *Indians Defeat Plan for Casino on Reservation*, HOUSTON CHRON., June 16, 1994, at 1A.

In the midst of the 100th Congress' deliberations over the Restoration Act, the Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In that case, two Indian tribes located in California were sponsoring unregulated gaming activities on their reservations.[4] The state of California attempted to enforce against the tribes a state statute regulating bingo operations. The tribes sued, asserting that California had no authority to enforce its gambling laws and regulations on tribal reservations because the United States, which has plenary power over Indian affairs, had not authorized California to do so. California argued that, pursuant tp Public Law 280 of 1953,[5] the United States had expressly authorized California to enforce its bingo statute against the tribes. Public Law 280 specifically granted California authority to (1) enforce its criminal laws on Indian reservations,[6] and (2) hear in its courts civil causes of action in which an Indian is a party.[7] California argued in *Cabazon Band* that its bingo statute was a criminal law which could be enforced on Indian reservations.[8]

The Supreme Court disagreed. The Court began by noting that, while Public Law 280 broadened California's

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[4]The California tribes were sponsoring bingo, draw poker, and other card games.

[5]*See* Pub. L. No. 83-280, ch. 505, §§2 & 4, 67 Stat. 588 (1953) (codified at 18 U.S.C. §1162(a) and 28 U.S.C. §1360(a) respectively).

[6]*Id.* §2 (codified at 18 U.S.C. §1162(a)).

[7]*Id.* §4 (codified at 28 U.S.C. §1360(a)).

[8]In addition to California, Public Law 280 applied to five other states: Alaska, Minnesota, Nebraska, Oregon and Wisconsin.

authority with regard to Indian reservations, Congress did not intend to grant it general civil regulatory authority. Public Law 280, the Court reasoned, was narrowly tailored to combat lawlessness on reservations and *not* "to effect total assimiliation of Indian tribes into mainstream American society." *Cabazon Band*, 480 U.S. at 207-08, 107 S.Ct. at 1087. Thus, according to the Court, when a state invokes Public Law 280 to enforce its laws, it must be determined whether the law is "criminal" in nature, and therefore applicable, or "civil" in nature, and therefore inapplicable *except* when the law is relevant to private civil litigation in state court. The question of whether a law is criminal or civil, in turn, depends on the law's practical effect. That is, a state law is criminal, and thus inapplicable under Public Law 280, if it generally *prohibits* certain conduct, but a state law is civil, and presumptively inapplicable, if it *regulates* the conduct at issue. *Cabazon Band*, 480 U.S. at 209-10, 107 S.Ct. at 1088.

Applying the criminal-prohibitory/civil-regulatory dichotomy,[9] the Court rejected California's claim that its bingo statute was criminal in nature on the basis that the statute is not a general prohibition on certain conduct. Instead, "the state law generally permits the conduct at issue, subject to regulation."[10] *Id.* at 209, 107 S.Ct. at

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[9]The Court noted that this Circuit originally enunciated the dichotomy in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981). *Cabazon Band*, 480 U.S. at 209-10, 107 S.Ct. at 1088.

[10]The statute in particular required bingo games to be operated by unpaid members of designated charitable organizations. In addition, it limited prizes to $250 and required profits to be used for charitable purposes. Cal. Penal Code §326.5 (1987).

1088. The Court analogized California's bingo statute to the state's other gambling statutes, all of which regulate (rather than prohibit) the relevant conduct.[11] The Court concluded that, given the extent to which the state currently regulated gambling, California had no public policy against bingo in particular or gambling in general. *Id.* at 211, 107 S.Ct. at 1089. California therefore could not prohibit the tribes from offering the gaming activities on their reservations.

Cabazon Band led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming. While Congress recognized that the growth in gaming generated substantial revenues for the tribes and, hence, fostered tribal autonomy, it nonetheless became concerned that unregulated growth might invite criminal elements. In 1988, Congress therefore enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701-21. IGRA was intended to balance the right of tribes to self-government with the need "to protect both the tribes and the gaming public from unscrupulous persons." *See generally* S. REP. NO. 446, 100th Cong., 2d Sess. 1-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-73.

IGRA establishes three distinct classes of gaming – Class I, Class II, and Class III – each with its own degree of regulation. IGRA defines Class I gaming as social games typically offered at traditional Indian ceremonies. 25 U.S.C. §2703(6). IGRA expressly states that it does not regulate Class I gaming. *Id.* §2710(a)(1). IGRA

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[11] In addition to bingo, California permits, with certain regulatory constraints, a lottery, pari-mutuel betting on horse races, and card games. *Cabazon Band*, 480 U.S. at 210-11, 107 S.Ct. at 1088-89.

defines Class II gaming as bingo and non-banking card games (i.e., card games in which the casino has no economic interest in the outcome). *Id.* §2703(7)(A). IGRA provides that a tribe may engage in Class II gaming so long as the state in which the tribe is located "permits" such gaming. *Id.* §2710(b)(1). Finally, IGRA defines Class III gaming as all forms of gaming, *id.* §2703-(8), particularly the lucrative casino-style games such as blackjack, slot machines, roulette and baccarat. *See* S. REP. NO. 446 at 3, 7, U.S. Code Cong. & Admin. News 1988, pp. 3073, 3077. IGRA places two important conditions on Class III gaming. First, just as it does with Class II gaming, IRGA establishes that a tribe may engage in Class III gaming so long as the state in which the tribe is located "permits" such gaming. 25 U.S.C. §2710(d)-(1)(B). Second, IGRA requires a tribe that seeks to engage in Class III gaming to negotiate a compact with the state in which it is located. *Id.* §2710(d)(1)(C). Congress viewed tribal-state compacts as the most effective means of balancing tribal sovereignty with the states' need to protect the public against the risks typically associated with Class III-type gaming. S. REP. NO. 446 at 13-14, U.S. Code Cong. & Admin. News 1988, pp. 3083-3084. If a state refuses to negotiate a compact with a tribe, IGRA permits the tribe to sue the state in federal court. 25 U.S.C. §2710(d)(7)(A)(i).

C.

Pursuant to IGRA, the Ysleta del Sur Pueblo petitioned the governor of Texas in February 1992 to begin negotiations to enter into a tribal-State compact.[12] Gov-

[12]The Tribe specifically proposed baccarat, blackjack, craps, roulette and slot machines, which hereinafter will be referred to collectively as "proposed gaming activities."

ernor Ann Richards took the position that she could not negotiate a compact for the proposed gaming activities because Texas law and public policy forbid such gaming activities. The tribe therefore sued the State in April 1993. In May 1993, The State moved to dismiss on the grounds that the Eleventh and Tenth Amendments barred the suit. The district court denied the State's motion in June 1993, and the State appealed in July 1993. The State's appeal from the district court's denial of the motion to dismiss (No. 93-8477) represents the first of three appeals in this case.

After we denied a motion to stay the proceedings pending resolution of the State's first appeal,[13] the parties returned to district court. In September 1993, the Tribe and the State each filed motions for summary judgment. The parties' motions primarily focused on a host of detailed IGRA-related questions, such as whether Texas law currently "permits" Class III games to be played. The parties also raised the issue of whether the Restoration Act *independently* bars the Tribe from engaging in Class III-type gaming. In November 1993, the district court granted the Tribe summary judgment. *Ysleta del Sur Pueblo v. State of Texas,* 852 F.Supp. 587 (W.D. Tex. 1993). The court found that Texas effectively "permits" the Class III games in which the Tribe is seeking to engage, and that therefore Texas could not refuse to negotiate a tribal-state compact. *Id.* at 590-96. The Court also found that the Restoration Act *does not* serve as an independent bar to the Tribe's gaming plans. *Id.* at 597.

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[13]The motion to stay was filed along with the first appeal. We denied the motion in August 1993, with the caveat that the governor could not be subject to process in the district court during the pendency of the State's first appeal.

In response to the court's summary judgment for the Tribe, the State filed its second appeal (No. 93-8823) in November 1993. The State again moved for a stay in the proceedings pending resolution of this latest appeal. Instead of granting a stay, we consolidated the State's two appeals in January 1994 and expedited their consideration. Meanwhile, the Tribe, in response to the State's second appeal, filed with this court a motion to dismiss that appeal for lack of jurisdiction. The Tribe argued that, absent the appointment of a mediator,[14] the district court's summary judgment for the Tribe was not a final judgment for purposes of 28 U.S.C. §1291. The Tribe's motion, however, was subsequently rendered moot when the district court appointed a mediator in February 1994. To ensure that its second appeal was properly preserved, the State formally appealed the court's appointment of a mediator. We consolidated the State's third appeal (No. 94-50130) with its remaining two (Nos. 93-8477 & 93-8823).

II.

Ous sister circuits have split on the issue of whether IGRA constitutionally permits an Indian tribe to sue a state. *Compare Seminole Tribe of Florida v. State of Florida,* 11 F.3d 1016, 1026-28 (11th Cir. 1994) with *Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273, 280-81 (8th Cir. 1993).[15] The State has

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[14]IGRA provides that, if a tribe and a state fail to reach a compact within the sixty-day period following a court order to do so, the court is empowered to appoint a mediator to choose between each party's "last best offer for a compact." 25 U.S.C. §2710(d)(7)(B)(iv).

[15]*See also* William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act,* 21

[footnote continued]

appealed precisely the same issue. However, as is apparent below, our resolution of the State's *second* appeal renders this issue moot. Mindful that we should not reach constitutional issues when a case can be resolved on other grounds, we will merely assume, without deciding, that Congress did not exceed its constitutional authority when it enacted IGRA.

III.

We now consider the State's two remaining appeals (Nos. 93-8823 & 94-50130), both of which essentially appeal the district court's order granting summary judgment in favor of the Tribe and denying the State's cross-motion for summary judgment. In their respective motions for summary judgment, the parties devoted most of their discussion to IGRA-related questions. The parties addressed the issue of whether Texas law "permits" the Tribe's proposed gaming activities to be played "for any purpose by any person." 25 U.S.C. §2710(d)-(1)(B). Texas, of course, argued that its laws and public policy prohibit the Tribe's proposed gaming activities whereas the Tribe argued the exact opposite. The State alternatively argued that the Restoration Act independently bars the Tribe from engaging in its proposed gaming activities. The Tribe argued that under either IGRA or the Restoration Act, the analysis and the conclusion are the same: Texas law does not prohibit the proposed gaming activities, and therefore Texas cannot bar the Tribe from engaging in them. As to both IGRA

HASTINGS CONST. L.Q. 71, 76-92 (1993); Joseph J. Weissman, NOTE, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 GEO. WASH. L. REV. 123, 133-61 (1993).

and the Restoration Act, the district court agreed with the Tribe and granted its motion for summary judgment. *See Ysleta*, 852 F.Supp. at 590-97. We conclude that (1) the Restoration Act and IGRA establish different regulatory regimes with regard to gaming, (2) the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue, and (3) the Tribe's suit is barred because the Restoration Act did not even attempt to abrogate the State's Eleventh Amendment immunity.

A.

The Tribe insists that, under either IGRA or the Restoration Act, the analysis for determining whether the Tribe's proposed gaming activities are allowed is the same. Specifically, it insists that §107(a) of the Restoration Act does not operate as an independnet bar to its proposed gaming activities because Texas does not "prohibit" the proposed gaming activities. The first sentence of §107(a) of the Restoration Act provides: "All gaming activities which are prohibited by the laws of the State of Texas are prohibited on the reservation and on lands of the tribe." 25 U.S.C. §1300g-6. The Tribe maintains that the term "prohibit" has special significance in federal Indian law, which is derived from *Cabazon Band*, and whether a federal court is interpreting IGRA or the Restoration Act, it should apply the same analysis, i.e., the *Cabazon Band* criminal-prohibitory/civil-regulatory dichotomy. Thus, according to the Tribe, the critical question under either IGRA or the Restoration Act is whether Texas law and public policy

"prohibit" (that is, criminalize rather than regulate) the proposed gaming activities.[16]

The Tribe argues that Texas does not prohibit the Tribe's proposed gaming activities by pointing to the State's broad definition of a lottery: " 'Lottery' means the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." Tex. Gov't. Code Ann. §466.002(3) (Vernon Supp. 1994). The Tribe contends that its proposed gaming activities fall within the State's definition of lottery. That is, like a lottery, the Tribe's proposed gaming activities (i.e., baccarat, blackjack, craps, roulette and slot machines) are all games of prize, chance and consideration. Because the State permits one type of game where the elements are prize, chance and consideration, the State no longer prohibits any other games with the same elements. The State, instead, merely regulates them. Consequently, according to the Tribe, §107(a) of the Restoration Act does not act as an independent bar to the Tribe's proposed gaming activities.

The Tribe's argument is appealing only because §107-(a) of the Restoration Act uses the word "prohibit." But our analysis of the legislative history of both the Restoration Act and IGRA leads ut to a conclusion contrary to that sought by the Tribe. When it passed IGRA, Congress indicated that, when determining whether Class II games are "prohibited" in certain states, federal

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[16]The Tribe contends that both IGRA and the Restoration Act incorporated the *Cabazon Band* rationale because both statutes were passed by the same committees in each chamber at roughly the same time.

courts should rely on *Cabazon Band*'s criminal-prohibitory/civil-regulatory distinction.[17] No such express recognition of *Cabazon Band* appears in the committee reports accompanying the Restoration Act. Rather, in considering the Restoration Act, Congress clearly was concerned with enacting the compromise between the Tribe, the State and various members of the Texas congressional delegation. Congress specifically drafted §107(a) "in accordance with the tribe's request in tribal Resolution No. T.C.-02-86." 25 U.S.C. 1300g-6(a). That resolution is crystal clear. The Tribe, in response to the concerns of Texas officials and various members of the State's congressional delegation, petitioned Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." Congress acquiesced, and in so doing, spelled out the purpose of §107(a): "[t]his section provides that gambling, lottery or bingo *as defined by the laws and administrative regulations* of the State of Texas is prohibited on the

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[17] In the committee report accompanying IGRA, Congress stated that:

> Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently by the Supreme Court in *Cabazon*.

S. Rep. No. 446 at 6. Thus, while Congress was specific as to *Cabazon Band*'s application to Class II gaming, Congress left open the question as to whether that case applied to Class III gaming. Because we conclude that the Restoration Act clearly does not incorporate *Cabazon Band*, we leave open the question of whether IGRA incorporates *Cabazon Band* with regard to Class III gaming.

tribe's reservation and on tribal lands." S. REP. NO. 90 at 10 (emphasis added). The report's reference to both the laws *and* administrative regulations of Texas is clearly inconsistent with a contention that the Tribe and Congress contemplated that the prohibitory-regulatory distinction of *Cabazon Band* would be involved in analyzing the Restoration Act. Furthermore, as a means of enforcing those laws and regulations, Congress provided in §107(a) that "[a]ny violation of the prohibition provided in this subsection shall be subject to *the same civil and criminal penalties* that are provided by the laws of the State of Texas." 25 U.S.C. §1300g-6(a) (emphasis added). Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty? We thus conclude that Congress did not enact the Restoration Act with an eye towards *Cabazon Band.*[18] Congress was merely acceding to the Tribe's request that the tribal resolution be codified. *See* S. REP. NO. 90 at 8 (the Tribe, "by formal resolution, requested that this legislation incorporate [its] existing law and custom that forbids gambling").[19]

The Tribe points to two items in the Restoration Act's legislative history that it believes indicates Congress incorporated *Cabazon Band* into §107(a) of the Act.

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[18] Our conclusin is buttressed by the fact that the Restoration Act, which (like IGRA) was enacted after *Cabazon Band* was decided, makes no reference to the case, whereas IGRA does. *See* S. REP. NO. 446 at 6, U.S. Code Cong. & Admin. News 1988, p. 3076. We take IGRA's reference to *Cabazon Band* as evidence that Congress knew how to incorporate the case when it so intended.

[19] The report also states that the "central purpose" of §107(a) is "to ban gaming on the reservations as a matter of federal law." S. REP. NO. 90 at 8.

First, Congress noted in its report that §107(b) "is a restatement of the law as provided in [Public Law 280]." *Id.* at 10. The reference to Public Law 280, the statute at issue in *Cabazon Band*, presumably is the hook on which the Tribe hangs this argument. The Tribe's argument, however, misses the mark, because §107(b), as opposed to §107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. In that sense *only*, §107(b) is a restatement of Public Law 280. But it is §107(a) that determines whether Texas "prohibits" certain gaming activities, and §107(a) is *not* a restatement of Public Law 280.

The Tribe's second argument admittedly raises a closer question. In August 1987, as the Restoration Act was on the brink of final passage in the House of Representatives, a member made the following statement on the floor of the House:

> It is my understanding that the Senate amendments to [§107] are in line with the rational [sic] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for [the Tribe] the holding and rational [sic] adopted in the Court's opinion in the case.

133 CONG. REC. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall). Standing alone, this statement supports the Tribe's argument that Congress intended to incorporate *Cabazon Band* into the Restoration Act. But we find ourselves confronted with substantial legislative history to the contrary, including the plain language of §107(a), its accompanying report language, and the tribal resolution to which §107(a) expressly refers. We cannot set aside this wealth of legislative history

simply to give meaning to the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration. *See, e.g., Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 648-50, 110 S.Ct. 2043, 2047-48, 109 L.Ed.2d 659 (1990). Rather, upon reviewing these materials, we are left with the unmistakable conclusion that Congress – and the Tribe – intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.[20]

B.

We find it significant that §107(c) of the Restoration Act establishes a procedure for enforcement of §107(a) which is fundamentally at odds with the concepts of IGRA. Under §107(c), the state of Texas is authorized to file suit in a federal court to enjoin any violation by the Tribe of the provisions of §107(a). 25 U.S.C. §1300g-6(c); *see also* S. REP. NO. 90 at 9. The state of Texas did not initiate this litigation under §107(c); rather, the Tribe brought this suit under IGRA. Because the Restoration Act and IGRA establish such fundamentally different regimes, we now must decide which statute applies in this case. The Tribe argues that, to the extent that a conflict between the two exists, IGRA impliedly repeals the Restoration Act. We disagree.

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[20] We are aware that the Supreme Court has established some rules of construction as to Acts of Congress relating to Indian affairs which require that Congress' intention be "explicit," "clear," "unambiguous," "plain" and "specific." *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Restoration Act satisfies these requirements.

The Supreme Court has indicated that "[r]epeals by implication are not favored." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497, 96 L.Ed.2d 385 (1987). The Court in *Crawford Fitting* further noted that, "where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 445, 107 S.Ct. at 2499 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976)). With regard to gaming, the Restoration Act clearly is a specific statute, whereas IGRA is a general one. The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide. Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law.[21] Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA. Finally, we note that in 1993, Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands.[22] Therefore, we conclude not only that the Restoration Act survives

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[21] *See* 25 U.S.C. §2701(5) ("[t]he Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law"); *id.* §2701(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

[22] *See* 25 U.S.C. §9411(a).

today but also that it – and not IGRA – would govern the determination of whether gaming activites proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.

The Tribe warns that our conclusion (i.e., that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "[e]very time the State modifies its gambling laws, the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making. The Tribe noted in its resolution that it viewed §107(a) of the Restoration Act as "a substantial infringement upon the Tribes' [sic] power of self government" but nonetheless concluded that relinquishment of that power was necessary to secure passage of the Act. To borrow IGRA terminology, the Tribe has already made its "compact" with the state of Texas, and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

C.

Finally, having concluded that the Restoration Act governs this case, we now must determine whether the Tribe's suit against the State is cognizable. The Eleventh Amendment bars any suit against a state in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237-40, 105 S.Ct. 3142, 3144-46, 87 L.Ed.2d 171 (1985).

A state's sovereign immunity under the Eleventh Amendment includes immunity from suits brought by Indian tribes. *Blatchford v. Native Village of Norfolk*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). While the State clearly raised the Eleventh Amendment as a defense to the Tribe's IGRA suit, it did not do the same with regard to the Restoration Act. The State's omission, however, does not mean we are precluded from raising the issue *sua sponte*, because the Eleventh Amendment operates as a jurisdictional bar. *See Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Ortiz v. Regan*, 749 F.Supp. 1254, 1264 (S.D.N.Y. 1990); 13 CHARLES A. WRIGHT, *et al.*, Federal Practice and Procedure §3524 at 167-71. We find nothing in the record indicating that the state of Texas consented to the Tribe's suit. Likewise, in enacting the Restoration Act, Congress said nothing whatsoever which could be construed as an abrogation of the State's sovereign immunity. Accordingly, we reverse the district court's summary judgment in favor of the Tribe and remand the case with instructions to dismiss the Tribe's suit for lack of jurisdiction.

IV.

For the foregoing reasons, we REVERSE the district court's summary judgment for the Tribe and REMAND with instructions to DISMISS the Tribe's suit.

APPENDIX H

[852 F.Supp. 587]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS,
PECOS DIVISION

YSLETA DEL SUR PUEBLO

v.

STATE OF TEXAS and Ann Richards,
Governor of the State of Texas.

No. P-93-CA-29.

Nov. 1, 1993.

Tom Diamond, Ron Jackson, John Batoon, Diamond, Rash, Gordon & Jackson, El Paso, TX, for plaintiffs.

Dan Morales, Will Pryor, Mary Keller, Jorge Vega, Toni Hunter, State Atty. Gen's. Office, Austin, TX, for defendants.

MEMORANDUM OPINION AND ORDER

BUNTON, Senior District Judge.

BEFORE THIS COURT, in the above-captioned cause of action, are the following:

1. Defendants' Motion for Partial Summary Judgment with Brief in Support Thereof;

2. Plaintiff's Motion for Summary Judgment with Brief in Support Thereof;
3. Plaintiff's Response to Defendants' Motion for Partial Summary Judgment with Brief in Support Thereof;
4. Defendants' Response to Plaintiff's Motion for Summary Judgment with Brief in Support Thereof;
5. Plaintiff's Supplemental Motion for Summary Judgment with Brief in Support Thereof;
6. Defendants' Supplemental Motion for Summary Judgment with Brief in Support Thereof;
7. Plaintiff's Response to Defendants' Supplemental Motion for Summary Judgment with Brief in Support Thereof; and
8. Defendants' Reply to Plaintiff's Supplemental Motion for Summary Judgment.

BACKGROUND

Plaintiff, Ysleta Del Sur Pueblo (hereinafter referred to as the "Tribe"), is a federally recognized Indian Tribe whose reservation is located in El Paso County, Texas. The Defendants are the State of Texas and Ann Richards, Governor of the State of Texas. On February 12, 1992, the Tribe requested that the Governor of Texas, Ann Richards, enter into negotiations for the formation of a compact with the Tribe which would allow the Tribe to conduct various types of gaming activities on their Tribal lands, pursuant to the Indian Gaming Regulatory Act (hereinafter referred to as "IGRA"), 25 U.S.C. §2701, *et seq.* On March 5, 1992, Karen Abernathy, Director of Scheduling in the office of the Governor acknowledged the Tribe's request, but due to the Gov-

ernor's heavy schedule, declined to meet with the Tribe to discuss the possible formation of a compact.

However, over the period of the next thirteen months, several meetings did take place between Tribal representatives and representatives from the Governor's General Counsel. During the course of these meetings, the Tribe proposed several versions of a Tribal State Compact. The Governor's representatives refused to negotiate over any proposed compact which would include any casino-style games.

As a result of a newspaper article published in the final edition of *The Houston Post* on April 1, 1993, in which the Governor was quoted as saying that the State would not negotiate a compact which included casino-style games, the Tribe filed this action.

In the Tribe's complaint, filed on April 15, 1993, the Tribe requested this Court to issue an Order requiring the State to enter into negotiations for the formation of a Tribal-State compact within a sixty day period from the entry of any such Order, pursuant to the IGRA. In the Tribe's First Amended Complaint, filed September 28, 1993, the Tribe seeks a determination as to exactly which games are the proper subject of negotiations of a Tribal-State compact under the IGRA.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

Summary judgment, "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judment as a matter of law." Fed. R. Civ. P. 56(c); *see Hansen*

v. Continental Ins. Co., 940 F.2d 971, 975 (5th Cir. 1991); *Hogue v. Royse City*, 939 F.2d 1249, 1252 (5th Cir. 1991). "Summary judgment procedure is properly regarded not as a disfavored procedural short-cut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 1).

> "All facts contained in the pleadings, depositions, admissions, and answers to interrogatories are reviewed by 'drawing all inferences most favorable to the party opposing the motion.' " *James v. Sadler*, 909 F.2d 834, 836 (5th Cir. 1990) (quoting *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889, 982 (5th Cir. 1989). However,
>
> > "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."
> >
> > *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190-91 (5th Cir. 1991) (quoting Fed. R. Civ. P. 56(e)).

Accordingly, the focus of this Court is upon disputes over material facts; that is, facts likely to affect the outcome of the lawsuit under the governing substantive law which will preclude summary judgment.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir.), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 107 (1987). The Fifth Circuit stated, "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court." *James*, 909 F.2d at 837; *see Matshshita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc).

The Supreme Court's 1986 trilogy of summary judgment cases clarified the test for summary judgment. In the first case of thr trilogy, *Anderson*, the Court stated the trial court must consider the substantive burden of proof imposed on the party making the claim. A plaintiff has the burden with respect to each of his or her claims and a defendant has the burden with respect to his or her defenses and claims for affirmative relief. *Anderson* requires this Court to substantively evaluate the evidence offered by the moving and nonmoving parties. "[T]he requirement is that there be no *genuine* issue of *material* fact." *Id.* at 248, 106 S.Ct. at 2510 (emphasis in original). A dispute is "genuine" " if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

In the second case of the trilogy, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.

574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court reiterated the requirement that once the party moving for summary judgment has made a prima facie showing there is no genuine issue as to any material fact, the nonmoving party must then come forward with "specific facts" showing a genuine issue for trial. "Its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. at 1356. The burden shifts to the nonmoving party to produce evidence in support of its claims. "The nonmovant can satisfy its burden by tendering depositions, affidavits, and other competent evidence to buttress itc claim." *Topalian v. Ehrman,* 954 F.2d 1125, 1132 (5th Cir. 1992). The nonmovant cannot establish a fact issue by resting on the mere allegations of the pleadings. "In fact, unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir. 1985).

The third case of the trilogy, *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), held when the moving party shows the opposing party is unable to produce the evidence in support of its case, summary judgment is appropriate. The entry of summary judgment is mandated" 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will bear the burden of proof at trial.' " *Kidd v. Southwest Airlines Co.,* 891 F.2d 540, 547 (5th Cir. 1990) (quoting *Celotex Corp.,* 477 U.S. at 318, 106 S.Ct. at 2552). In *Celotex Corp.,* it was not necessary for the

motion for summary judgment to be supported by affidavits or other materials specifically negating the nonmoving party's claim so long as the District Court was satisfied of the absence of evidence to support it.

Nothing in Rule 56(c) "requires that an oral hearing be held on a motion for summary judgment." *McMillan v. City of Rockmart,* 653 F.2d 907, 911 (5th Cir. 1981); *see* Fed. R. Civ. P. 78; Local Court Rule CV-7(h). However, this Court has demonstrated its willingness to allow a nonmoving party a day in court in borderline cases where, under the governing law or reasonable extensions of existing law, the hearing of some testimony would be helpful to understanding the proper application of the law. However, such is not the situation in the case at bar.

DISCUSSION

The issues presented by the Tribe and the State in their Motions for Summary Judgment are: (1) Whether or not, under the IGRA, the Governor and the State of Texas have failed to negotiate in good faith with the Tribe over the formation of a Tribal-State Compact; (2) which games that the Tribe has requested are the proper subject of negotiations under Class III gaming of the IGRA; (3) whether the Johnson Act, 15 U.S.C. §1171, *et seq.*, prevent the transportation of the proposed gambling devices in the State of Texas; and (4) whether or not the Restoration Act, 25 U.S.C. §1300g-6, prohibits gaming activities pursuant to the IGRA.

THE IGRA FRAMEWORK

Congress enacted the IGRA in 1988. In §2701 Congress listed its findings:

(1) numerous tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal government revenue;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such activity.

25 U.S.C. §2701.

The stated purposes of the IGRA are:

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operators and the players; and

(3) to declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are neces-

> sary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. §2702.

Under IGRA gaming is divided into three classes. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individual as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. §2703(6). Class I gaming is subject to the exclusive jurisdiction of the Indian tribes. 25 U.S.C. §2710(a)-(1).

Class II gaming means "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . . including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo and card games that – (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the state and are played at any location in the State," provided such card games comply with the laws and regulations of the State regarding hours of operation, limitations on wagers, and pot sizes. 25 U.S.C. §2703-(7)(A). Class II gaming does not include "any banking card games, including baccarat, chemin de fer, or blackjack, or . . . electronic or electromechanical facsimilies of any game of chance or slot machines of any kind." 25 U.S.C. §2703(7)(B). The tribes have jurisdiction over Class II gaming, subject to the requirements of IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. §2710(b).

Class III gaming includes all forms of gaming that are not Class I or II gaming. 25 U.S.C. §2703(8). The

games that are in dispute are Class III games. In regard to Class III games the IGRA provides:

> Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> (A) authorized [by an approved Tribal] ordinance or resolution . . . .,
>
> (B) *located in a State that permits such gaming for any purpose by any person, organization, or entity*, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

If a tribe wishes to engage in Class III gaming activities on tribal land, it must "request the state in which such lands are located to enter into such negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. §2710-(d)(3)(a). Upon receiving the request, the state *must* negotiate in good faith with the Tribe. *Id.* (emphasis added).

The stimulus that led to the passage of the IGRA was the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). Before discussing *Cabazon* it is necessary to determine if Congress intended the *Cabazon* analysis to be applied in cases brought under the IGRA. 25 U.S.C. §2710(d). The State of Texas asserts that the analysis in *Cabazon* should not be followed because Texas is not a P.L. 280 state. P.L. No. 83-280, codified as 18 U.S.C. §1162 and 28 U.S.C. §1360, gave certain states limited civil and general criminal jurisdiction in certain areas of Indian country within their borders. The State asserts that it is unnecessary for this Court to apply the civil/regulatory or criminal/prohibi-

tory analysis because it is superseded by the language in the IGRA.

The definitive language in the IGRA in order to determine whether or not a particular game is the proper subject of a Tribal-State Compact is the phrase "located within a State that permits such gaming for any purpose by any person, organization or entity".

The Senate Report accompanying IGRA's passage provided the following guidance in construing the above mentioned language in IGRA:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal Courts many times, most recently by the Supreme Court in *Cabazon*.

S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076. Although the language in the Report refers to Class II gaming, it also applies to Class III gaming. *See Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1030 (2d Cir. 1990), *cert. denied*, 499 U.S. 975, 111 S.Ct. 1620, 113 L.Ed.2d 717 (1991) (applying well settled principles of statutory construction the Court found the Senate Report's conclusion regarding the application of *Cabazon* analysis applicable to Class III gaming). *See also U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366 (8th Cir. 1990): *Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson*, No. Civ-S-92-812, 1993 WL 360652 (E.D. Cal. July 20, 1993), and *Seminole Tribe of Florida v. Florida*, No. 91-6756-CIV, 1993 WL 475999 (S.D. Fla.

September 22, 1993). The civil/regulatory and criminal/prohibitory analysis was intended to be part of the IGRA framework determining the appropriate scope of Class III gaming.

In *Cabazon*, interpreting a California statute, which allowed some forms of bingo but not high stakes bingo, the Supreme Court found the statutes to be regulatory in nature, stating:

> California does not prohibit all forms of gambling. California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling. California also permits pari-mutuel horse-race betting. Although certain enumerated gambling games are prohibited . . . , games not enumerated . . . are permissible . . . [B]ingo is legally sponsored by many different organizations and is widely played in California . . . In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular. 480 U.S. at 211, 107 S.Ct. at 1089. The Court cautioned that the mere fact that a law could be enforced by criminal as well as civil mechanisms did not automatically convert it into a criminal law. The key is "whether the conduct at issue violates the State's public policy." 480 U.S. at 209, 107 S.Ct. at 1089.

The State maintains that Texas has a broad public policy against commercial gambling. Specifically they point out that Texas prohibits all forms of gambling with the exception of bingo, pari-mutuel betting on horse and dog races, charitable raffles, and the Texas lottery. Tex. Penal Code §4701 *et seq.* The Tribe maintains that the

public policy with respect to gaming in Texas is civil/regulatory.

Not only does Texas allow the above-mentioned gambling activities, but it also allows electronic, electromechanical, or mechanical games of chance as long as the reward is a non-cash prize with a value of no more than five dollars. Act of June 17, 1993, ch. 774, § 1993 Tex. Sess. Law Serv. 3030 (Vernon). Additionally, wagers on carnival contests are not considered illegal so long as the prize is limited to merchandise worth no more than $25.00. Tex. Panel Code Ann. § 47.01(1)(C), (D) (Vernon Supp. 1992). Finally, social gambling is not illegal if the place in which the gambling is conducted is private, there are even chances and risks, and there is no bank. Tex. Penal Code Ann. § 47.02(b).

It can no longer be asserted that Texas' public policy is against gambling. *Carnival Leisure Industries, Ltd. v. Aubin*, 830 F.Supp. 371 (S.D. Tex. 1993). By allowing pari-mutuel gambling at horse and dog tracks, various bingo games, and promiting a multi-billion dollar lottery, Texas can no longer assert that it has a broad public policy against gambling, to so claim would be anachronistic. *Id. See also U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 367 (8th Cir. 1990) (South Dakota law was civil/regulatory where state permitted bingo, horse and dog racing, a state lottery and slot machines); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480 (W.D. Wis. 1991), *app. dism'd*, 957 F.2d 515 (7th Cir. 1992), *cert. denied*, 506 U.S. 829, 113 S.Ct. 91, 121 L.Ed.2d 53 (1992) (State law is civil/regulatory where it permits pari-mutuel betting on horse, dog and snow mobile racing, allows charitable raffles and bingo, and operates lottery and lotto). Thus this Court agrees with the Tribe, Texas is a civil/regulatory jurisdiction when it comes to gaming.

The IGRA and *Cabazon* combined demonstrate that a two-step analysis must be employed to determine which Class III games are the proper subject of a Tribal-State Compact. *Rumsey Indian Rancheria of Wintum Indians, Table Mountain Rancheria v. Wilson,* No. Civ-S-92-812, 1993 WL 360652 (E.D. Cal. July 20, 1993). In step one the court must determine whether the state permits the gaming activity to be played "for any purpose by any person" *Id.* If the game is permitted then it is clear that the game is the proper subject of a Tribal State Compact under the IGRA, thus the analysis ends at that point. However, if the game is not permitted by the state then the court must proceed to step two of the analysis. It is under step two that the *Cabazon* analysis is utilized to ascertain whether the proposed game violates the state's public policy. If the state's public policy does not prohibit the game, then the game is the proper subject of a Tribal-State Compact. The Court in *Rumsey* summarized the analysis as follows:

> The effect of IGRA is simply to provide a shortened application of the *Cabazon* rule where a game is found to be played within a state. In such instance, no further analysis is necessary to find the game is proper for a Tribal-State compact. In every other case, however, *Cabazon* retains its full vitality and a game will only be prohibited on Indian lands if it violates the state's public policy. *Id.*

It is also important to note that the Tribe does not have to show that the state formally authorizes the same gaming activities of which they plan to offer; the key inquiry is whether the state prohibits those activities. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 770 F.Supp. at 487.

TRIBE'S PROPOSED GAMES

Black Jack, Roulette, Baccarat, Craps (Dice), and "Slot" machines, including electronic and electromechanical games of chance, are the games that the Tribe has sought to include in the negotiations of the Tribal-State Compact. The Tribe asserts that the games it has proposed should be included in the negotiation of a Tribal-State compact under the IGRA. The State asserts that the "casino-type" games the Tribe proposes are not permitted in Texas and are not the proper subject of any negotiations. Specifically, the State has maintained that the only Class III gaming activities allowed are those which Texas expressly allows, pari-mutuel betting on horse and dog racing and the State Lottery. The State maintains the specific gaming activities requested by the Tribe are neither "played" nor allowed; therefore, such gaming activities should not be included in the negotiation of a Tribal-State Compact under the IGRA.

The Tribe maintains that each of the games it has requested are permitted in Texas. The Tribe uses the definition of "Lottery" as that term is defined in the State lottery Act in support of its position.

When the present State constitution was adopted, it contained the following provision:

> The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.

Tex. const. art. III, §47 (1876). At that time there was no constitutional or legislative definition of "lottery." It was not until 1936 when the Texas Supreme Court decided *City of Wink v. Griffith Amusement Co.*, 129

Tex. 40, 100 S.W.2d 695 (1936) (citation omitted), in which the elements of a lottery were stated as the offering of a prize, the award of a prize by chance, and the giving of a consideration for an opportunity to win the prize.

The first legislative definition of the term "lottery" appeared in 1974 when Texas adopted its present Penal Code:

> "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

Tex. Penal Code Ann. §47.01(6) (Vernon 1989). On November 5, 1991, the State of Texas amended its constitution to provide that the Legislature by general law may authorize that State to operate lotteries. Tex. Const. Art. III, §47(3) (1991). When the Legislature passed the State Lottery Act, lottery is defined as:

> "Lottery" means the procedures operated by the State under this Act through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.

Tex. Rev. Civ. Stat. Ann. art. 179g, §1.02(3) (Vernon Supp. 1992). As evidenced by the above definition, lottery is broadly defined and includes as its elements prize, chance, and consideration.

The State argues that although the legislature could authorize casino gambling, that has no bearing on any issue before this Court. The State further argues that

whether or not the gaming activities requested by the Tribe could fall under the definition of "lottery" in the Lottery Act is irrelevant. *Id.* The State appears to have missed the point. Again we return to the key phrase in IGRA: "permits such gaming for any purpose by any person, organization, or entity . . .".

In determining whether Texas permits the gaming activities at issue it is not necessary to determine whether or not the State has given express approval to the playing of a particular game. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F.Supp. at 486. In *Lac du Flambeau* the State of Wisconsin could engage in any game of chance, prize, and consideration under its lottery laws. The tribe sought to include casino games, video games and slot machines in its negotiations with Wisconsin. Wisconsin argued that since the games the tribe requested were not specifically authorized under state law, they were not required to negotiate over those types of games. The court concluded that since Wisconsin was a civil/regulatory jurisdiction, and under the lottery law the state was permitted to play any game of prize, chance and consideration, then it must negotiate a Tribal-State compact governing the conduct of any type of class III gaming requested by the tribe which involved prize, chance and consideration. This Court agrees with the reasoning of *Lac du Flambeau.*

The State cites *Seminole Tribe of Florida v. Florida*, No. 91-6756-CIV, 1993 WL 475999 (S.D. Fla. September 22, 1993), for the proposition that just because the state allows some types of Class III gaming to occur the state is not required to engage in negotiations over all types of Class III gaming activities. The Court agrees with the State in that regard; however, the court in

Seminole was interpreting Florida's Constitution and Statutes, not Texas'. Furthermore the Tribe does not advance that postiion before this Court, they maintain that the games they seek to include in the negotiations are permissible under the existing laws of Texas.

Interpreting the Texas Lottery Act, the only restriction found with regard to the Act's broad definition of lottery is contained in §2.02(k):

> The Comptroller shall adopt rules prohibiting the operation of any game using a video lottery machine or machine. As used in this subsection "video lottery machine" or "machine" means any electronic video game machine that, upon the insertion of cash, is available to play or simulate the play of a video game, including but not limited to video poker, keno, and blackjack, utilizing a video display in microprocessors in which the player may receive free games or credits that can be reedeemed for cash, coins or tokens, or that directly dispenses cash, coins, or tokens.

Tex. Rev. Civ. Stat. Ann. art. 179g, §2.02(k) (Vernon Supp. 1992). The State Lottery Act only excludes the video forms of casino games, not the live or other non-video electronic games.

The Texas Lottery Act is not the only legislation that supports the Tribe's position that Texas allows "casino gaming". In section 47.01 of the Texas Penal Code a bet is defined as:

> "Bet" means an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:
>
> (A) . . .
>
> (B) . . .

> (C) an offer of merchandise with a value not greater than $25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

Texas Penal Code Ann. §47.01 (Vernon 1989). The above exception is referred to as the "carnival exception". A recent opinion of Attorney General Dan Morales dated April 20, 1992, dealing with the validity of casino nights sponsored by charitable organizations held that they would be in violation of the law unless they came within the carnival exception. The opinion states:

> Those participating in "casino games" at the described non profit charitable organizations fund raising event would violate the Penal Code §47.02 prohibition on gambling – "making bets" – unless as a matter of fact, the "casino games" in question would fall within the "carnival contests" exception to the definition of "bet" in the Penal Code §47.01-(1)(C) and (D).

Op. Tex. Atty. Gen. No. DM-112 (1992).

Thus, it is clear that casino gaming is permitted under the carnival exception; therefore satisfying the requirement of section 2710(d)(1) of IGRA . . . ." permits such gaming *for any purpose by any person, organization, or entity* . . .". (emphasis added).

On June 17, 1993, section 47.01 of the Texas Penal Code was amended to exclude from the definition of gambling device:

> . . . any electromechanical or mechanical contrivance designed, made, and adopted solely for bona fide amustment purposes of the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties or representation of value redeemable for those items which have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5,00, whichever is less.

Act of June 17, 1993, ch. 774, §1, 1993 Tex. Sess. Laws 3030 (Vernon).

Because casino gaming is permitted by some persons and individuals under the carnival exception, and based on the definition of "lottery" in the Texas Lottery Act allowing games which include chance, prize, and consideration, the Court is of the opinion that the casino games requested by the Tribe should be included in the negotiations of a Tribal-State Compact under the IGRA.

GOOD-FAITH NEGOTIATIONS UNDER IGRA

The Tribe, in addition to asserting that the State has "wholly" failed to negogiate, asserts that the State has failed to negogiate in good faith. The State has consistently refused to negotiate with the Tribe concerning the "casino style" games the tribe has proposed. The State has maintained that the proposed games are not allowed in Texas; therefore it has repeatedly refused to engage in negotiations over the Tribe's proposed games.

When the State wholly fails to negogiate it cannot meet its burden of proof to show that it has negogiated in good faith. *Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024 (2nd Cir. 1990). Furthermore:

> The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of the IGRA, and that it declared its willingness to resolve these legal issues of first impressions by litigation, do not alter the outcome. The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses. Further, the manifest purpose of the statute is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate. The delay is hardly ameliorated because that state's refusal to negotiate is not malicious.

Id. See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. at 482 (where the state wholly fails to negotiate, it cannot meet its burden to establish that it has bargained in good faith).

It is not necessary to repeat the state's position, suffice it to say that it is clear that the State has failed to negotiate with the Tribe. Before the Court concludes that the State must negotiate with the Tribe, the State's arguments under the Johnson Act and the Restoration Act must be addressed.

JOHNSON ACT

The State contends that the transportation of any gambling devices would be illegal under the Johnson Act, 15 U.S.C. §1172. Gambling devices are defined as, among other things, any slot machine or other:

> machine or meahcnical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in

> connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may be entitled to receive, as the result of the application of an element of chance, any money or property . . .

Id. at §1171(a)(2). The IGRA expressly provides that the prohibitions contained in the Johnson Act "shall not apply to any gaming conducted under a Tribal-State Compact that . . . (A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. §2710(d)(6). To support their position the Defendant's cite *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Greene,* 995 F.2d 179 (10th Cir. 1993).

In *Potawotami,* the Tenth Circuit Court of Appeals held that since video lottery terminals were not allowed under the provisions of Oklahoma law, the Johnson Act prohibited their transportation and the waiver contained in the IGRA did not apply since the subject gambling devices were not legal in the state of Oklahoma. The holding of *Potawatomi* is narrow, gambling devices that are not legal in the subject state cannot be transported or used within Indian country within that state absent a statutory exception to the prohibition. Oklahoma has no state run lottery and does not allow the numerous gambling activities that Texas permits.

Additionally, the language of §1772 under the IGRA expressly permits transportation of gambling devices, if those devices are designed "for use at and transported to licensed gambling establishments where betting is legal under applicable laws.. . ." 15 U.S.C. §1172. It is the opinion of the Court that the type of gambling devices

at issue are exempt from the Johnson Act pursuant to section 2710(d)(6) of the IGRA.

RESTORATION ACT

The State of Texas argues that 25 U.S.C. §1300g-6 of the Restoration Act, which restored federal trust status to the Ysleta Del Sur Pueblo in 1987, precludes gaming by the tribe pursuant to the IGRA.

As part of the Restoration Act, §1300g-6, prohibited the tribe from engaging in any gaming activity that was prohibited by the laws of the State of Texas. Section 1300g-6 provides:

> (a) In general
>
> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection will be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.
>
> (b) No State regulatory jurisdiction
>
> Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

The clear purpose and intent of the IGRA is to further the economic development of Indian Tribes and to further the longstanding federal goal of establishing tribal independence and self-sufficiency. The State is basically arguing that the IGRA and its clear purpose, allowing gaming activities to be conducted by tribes on tribal

lands, should be ignored and that the Ysleta Del Sur Pueblo be barred from obtaining the benefits IGRA was intended to provide for Indian Tribes, this the Court is unwilling to do. The law is clear and well settled, it is basic statutory construction that where there is a conflict in two statutory enactments, the latter enactment will control. *U.S. v. Crittenden,* 600 F.2d 478 (5th Cir. 1979).

Even if this Court were to follow the State's argument, the Restoration Act would have no effect on the relief the Tribe requests. The Tribe has requested Class III gaming activities which are not prohibited by the laws of the State of Texas.

CONCLUSION

The Court finds that the State is required to negotiate with the Tribe concerning the casino-type games of chance that the tribe has proposed. Furthermore, neither the Johnson Act nor the Restoration Act prohibits the games that the Tribe has proposed.

IT IS ORDERED that the State of Texas is required to conclude a Tribal-State Class III Gaming Compact with Plaintiff Ysleta Del Sur Pueblo Indians within sixty (60) days from the date of this Order.